

No. 14645

United States
Court of Appeals
for the Ninth Circuit

FRED I. PUTNAM and JAMES A. OVERMAN,
Appellants,
vs.

HARRY C. LOWER, JOHN KADLEC, GEORGE
S. HERNING, EDGAR L. PEECHER,
WILLIAM E. BARQUIST and NORMAN L.
BUNKER, Appellees.

Transcript of Record

Appeal from the United States District Court for the Western
District of Washington, Northern Division

FILED
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF PROCTORS:

WILLIAM H. BOTZER of Messrs. Peyser, Car-
tano, Botzer & Chapman,
1415 Joseph Vance Bldg., Seattle 1, Wash.

Proctor for Appellants, Fred I. Putnam
and James A. Overman.

BOGLE, BOGLE and GATES,
M. BAYARD CRUTCHER,
603 Central Bldg., Seattle 4, Washington,
For Respondents Harry C. Lower and
John Kadlec.

ROBERT B. ALLISON,
400 Central Bldg., Seattle 4, Washington,
LEWIS S. ARMSTRONG,
760 Central Bldg., Seattle 4, Washington,
For Respondents George S. Herning, Ed-
gar L. Peecher and William E. Barquist.

ROBERT C. WELLS,
2703 Smith Tower, Seattle 4, Washington,
Proctor for Norman L. Bunker.

ANDERSON & COLLINS,
1114 Vance Bldg., Seattle, Washington.
Proctors for Robert J. Tobin.

In the United States District Court for the Western District of Washington, Northern Division

In Admiralty—No. 16039

HARRY C. LOWER, Libelant,
vs.

THE Oil Screw SILVER SPRAY, her engines,
tackle, apparel, furniture and equipment, and
ROBERT F. TOBIN, Respondents.

LIBEL

To the Honorable the Judges of the Above Entitled Court:

The libel of Harry C. Lower against the oil screw Silver Spray of Seattle, Washington, Official No. 250,538, her engines, tackle, apparel, furniture and equipment, and against Robert F. Tobin, in a cause of wages and damages, civil and maritime, alleges as follows:

Action Under Special Rule For Seamen to Sue
Without Security and Prepayment of Fees

I.

At the times herein mentioned the respondent oil screw vessel Silver Spray, was, and still is, a vessel documented under the laws of the United States, at the Port of Seattle, in this District, and owned by the respondent Robert F. Tobin, a resident of the City of Spokane, Washington.

II.

Said vessel is now moored in navigable waters within the Port of Seattle, and within the jurisdiction of this Honorable Court.

III.

On or about April 17, 1954, the respondent Robert F. Tobin, as master of the said vessel, hired libelant as a member of the crew of said vessel for the 1954 tuna fishing season, on a 1/10th share of the catch, and represented to him that said vessel would engage in fishing for tuna from the Port of San Diego, California.

IV.

Thereafter and on or about April 21, 1954, libelant joined the said vessel at Seattle, Washington, and engaged in work as a member of the crew thereof in preparing said vessel for sea.

V.

During the month of May, 1954 the respondent Tobin took the said vessel to Ketchikan, Alaska, on what was represented to libelant and the other crew members to be a shake-down cruise preliminary to taking it to San Diego for the tuna fishing season. The said respondent then left the vessel at the Port of Ketchikan, and abandoned her without notice to the libelant or other members of the crew.

VI.

Said vessel returned to the Port of Seattle on or about June 3, 1954. The respondent Tobin then failed and refused to rejoin the vessel, and has since

failed to provide the vessel with any funds, provisions or outfit to continue the season.

VII.

Libelant left the said vessel at the Port of Seattle on June 5, 1954, the said owner being absent and his whereabouts still unknown. Libelant has been discharged, without receiving any wages whatsoever, and without his consent, and without any fault on his part.

VIII.

On information and belief, libelant's share of the catch during the 1954 tuna fishing season would have been worth the sum of \$5,000.00, had the said fishing venture been fulfilled as promised to libelant by the respondent Tobin.

IX.

Libelant's services on board the said vessel between March 21, 1954, and June 5, 1954, were reasonably worth the sum of \$600.00.

X.

All and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court.

Wherefore, libelant prays:

1. That process in due form of law according to the course and practice of this Court in causes of admiralty and maritime jurisdiction may issue against the said oil screw vessel Silver Spray, her engines, tackle, apparel, furniture and equipment, and that all persons having any interest therein

may be cited to appear and answer under oath all and singular the matters aforesaid.

2. That the said respondent Robert F. Tobin be required to appear and answer all and singular the matters aforesaid.

3. That the court enter a decree herein for libelant in the sum of \$5,000.00, and libelant's costs, and that the said vessel, her engines, tackle, apparel, furniture and equipment be sold in the manner provided by law to answer the decree for the amount adjudged due to libelant herein, and that libelant do have and recover of the respondent Robert F. Tobin the amount of any deficiency resulting from the sale of said vessel, and that judgment therefor against said respondents be entered herein in the manner provided by law.

4. That the Court shall direct the manner in which actual notice of the commencement of this suit shall be given by libelant to the master or other ranking officer or caretaker of the said oil screw vessel Silver Spray, and to any person who has recorded a notice of claim for any undischarged lien upon said vessel as provided in Section 30 of the Ship Mortgage Act, 1920.

5. That libelant have such other and further relief as in the premises he may be entitled to receive.

/s/ BOGLE, BOGLE & GATES,

/s/ CLAUDE E. WAKEFIELD,

/s/ M. BAYARD CRUTCHER,

Proctors for Libelant

Duly Verified.

[Endorsed]: Filed June 10, 1954.

[Title of District Court and Cause.]

MONITION AND ATTACHMENT

The President of the United States of America
To the Marshal of the United States for the Western District of Washington, Greeting:

Whereas, a Libel hath been filed in the United States District Court for the Western District of Washington, on the 10th day of June, in the year of our Lord one thousand nine hundred and fifty four, by Harry C. Lower, Libellant vs. The Oil Screw Silver Spray, her engines, tackle, apparel, furniture and equipment, and Robert F. Tobin, Respondents, for the reasons and causes in the said Libel mentioned, and praying the usual process and monition of the said Court in that behalf be made, and that all persons interested in the said Oil Screw Silver Spray, her tackle, etc., may be cited in general and special to answer the premises, and all proceedings being had that the said Oil Screw Silver Spray, her tackle, etc., may for the causes in the said Libel mentioned, be condemned and sold to pay the demands of the Libellant.

You Are Therefore Hereby Commanded to attach the said Oil Screw Silver Spray, her tackle, etc., and to retain the same in your custody until the further order of the Court respecting the same, and to give due notice to all persons claiming the same, or knowing or having anything to say why the same should not be condemned and sold pursuant to the prayer of the said Libel, that they be and appear

before the said Court, to be held at Seattle, in the Western District of Washington, on the 30th day June, A.D. 1954, at 10 o'clock in the forenoon of the same day, if that day shall be a day of Jurisdiction, otherwise on the next day of Jurisdiction thereafter, then and there to interpose a claim for the same, and to make their allegations in that behalf. And what you shall have done in the premises do you then and there make return thereof together with this writ.

Witness, the Hon. John C. Bowen, Judge of said Court, at the City of Seattle, in the Western District of Washington, this 10th day of June in the year of our Lord one thousand nine hundred and fifty four and of our independence the one hundred and seventy-eighth.

MILLARD P. THOMAS,

Clerk

/s/ By J. THORNBURGH,

Deputy Clerk

Marshal's Return

I hereby certify and return that in obedience to the attached Monition and Attachment, I attached the Oil Screw Silver Spray, her engines, tackle, apparel, furniture and equipment, at Seattle, Washington, at 3:35 p.m. June 10, 1954, and have her in my custody. I have given due notice to all persons claiming the same, or knowing or having anything to say why same should not be condemned and sold pursuant to the prayer of the Libel, that they

be and appear before this Court to be held at Seattle in the Western District of Washington, on the 30th day of June, 1954, by causing a Notice to be published in The Daily Journal of Commerce, Seattle, Washington, on the 12th day of June, 1954, and by posting like Notice on the seized Oil Screw Silver Spray, at 1515 Fairview Avenue North, Seattle.

A true copy of the Monition and Attachment, with copy of Libel, was served on Helge G. Oger, engineer on board the boat, at 1515 Fairview Avenue North, Seattle, Washington, in whose custody I found the above Oil Screw Silver Spray.

W. B. PARSONS, U. S. Marshal

/s/ By PYRL J. FORCIER, Deputy

Marshal's fee, \$2.00; Expense, 40c; Advertising, \$14.00; Total, \$16.40.

Affidavit of Publication

State of Washington,
County of King—ss.

L. J. Brown, being first duly sworn, on oath deposes and says that he is the business manager and one of the publishers of The Daily Journal of Commerce, a daily newspaper. That said newspaper is a legal newspaper and it is now and has been for more than six months prior to the date of the publication hereinafter referred to, published in the English language continuously as a daily newspaper in Seattle, King County, Washington, and it is now

and during all of said time was printed in an office maintained at the aforesaid place of publication of said newspaper. That the said Daily Journal of Commerce was on the 12th day of June, 1941, approved as a legal newspaper by the Superior Court of said King County.

That the annexed is a true copy of U. S. Marshal's Notice as it was published in the regular issue (and not in supplement form) of said newspaper on the 12th day of June, 1954, and that said newspaper was regularly distributed to its subscribers during all of said period.

/s/ L. J. BROWN

Subscribed and sworn to before me this 12th day of June, 1954.

[Seal] /s/ E. CAMPBELL,
Notary Public in and for the State of Washington,
residing at Seattle.

U. S. Marshal's Notices

Notice. Whereas, on the 10th day of June, 1954, Harry C. Lower, Libelant, by Bogle, Bogle & Gates of Seattle, Washington, Proctors for Libelant, filed a libel in the District Court of the United States for the Western District of Washington, against the Oil Screw Silver Spray, her engines, tackle, apparel, furniture and equipment, and Robert F. Tobin, Respondents, in a cause of action civil and maritime, numbered 16039, for damages in the sum of \$5,000.00. And whereas, by virtue of process in due form of law, to me directed, I have attached

and retain the same in my custody. Notice is hereby given to all persons claiming the same, or knowing or having anything to say why the same should not be condemned and sold pursuant to the prayer of the said Libel, that they be and appear before the said court, to be held at Seattle, Washington, in the Western District of Washington, on the 30th day of June, A.D. 1954, at ten o'clock in the forenoon of the same day, if that day shall be a day of Jurisdiction, otherwise on the next day of Jurisdiction thereafter, then and there to interpose a claim for the same, and to make their allegations in that behalf. W. B. Parsons, U. S. Marshal. (3224-M)

[Endorsed]: Filed June 15, 1954.

F. I. Putnam and J. A. Overman vs.

In the United States District Court for the Western District of Washington, Northern Division

In Admiralty—No. 16039

HARRY C. LOWER, Libelant,
JOHN KADLEC, DOSS R. PAYNE, and NOR-
MAN L. BUNKER, Intervening Libelants,

VS.

THE Oil Screw SILVER SPRAY, her engines,
tackle, apparel, furniture and equipment, and
ROBERT F. TOBIN, Respondents.

INTERVENING LIBEL

To the Honorable the Judges of the Above Entitled
Court:

The intervening libel of John Kadlec against the oil screw Silver Spray of Seattle, Washington, Official No. 250,538, her engines, tackle, apparel, furniture and equipment, and against Robert F. Tobin, in a cause of wages and damages, civil and maritime, alleges as follows:

Action Under Special Rule for Seamen to Sue Without Security and Prepayment of Fees.

I.

At the times herein mentioned the respondent oil screw vessel Silver Spray, was, and still is, a vessel documented under the laws of the United States, at the Port of Seattle, in this District, and owned by the respondent Robert F. Tobin, a resident of the City of Spokane, Washington.

II.

Said vessel is now moored in navigable waters within the Port of Seattle, and within the jurisdiction of this Honorable Court.

III.

That on or about April 14, 1954, the respondent Robert F. Tobin, as master of said vessel, hired intervening libelant Kadlec as a member of the crew of said vessel for the 1954 tuna fishing season; that said intervening libelant was hired on the basis of 1/10th share of the catch; that it was represented to said intervening libelant that said vessel would engage in fishing for tuna during the 1954 fishing season from some port in the State of California.

IV.

That thereafter, and on or about April 23, 1954, this intervening libelant joined the said vessel at Seattle, Washington and engaged in work as a member of the crew thereof in preparing said vessel for sea.

V.

During the month of May, 1954 the respondent Tobin took the said vessel to Ketchikan, Alaska, on what was represented to this intervening libelant and the other crew members to be a shake-down cruise preliminary to taking it to San Diego for the tuna fishing season. The said respondent then left the vessel at the Port of Ketchikan, and abandoned her without notice to this intervening libelant or other members of the crew.

VI.

Said vessel returned to the Port of Seattle on or about June 3, 1954. The respondent Tobin then failed and refused to rejoin the vessel, and has since failed to provide the vessel with any funds, provisions or outfit to continue the season.

VII.

This intervening libelant left the said vessel at the Port of Seattle on June 5, 1954, the said owner being absent and his whereabouts still unknown. This intervening libelant has been discharged, without receiving any wages whatsoever, and without his consent, and without any fault on his part.

VIII.

On information and belief, this intervening libelant's share of the catch during the 1954 tuna fishing season would have been worth the sum of \$5,000.00, had the said fishing venture been fulfilled as promised to intervening libelant by the respondent Tobin.

IX.

This intervening libelant's services on board the said vessel between April 23, 1954, and June 5, 1954, were reasonably worth the sum of \$400.00.

X.

All and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court.

The intervening libel of Doss R. Payne against the oil screw Silver Spray of Seattle, Washington, Official No. 250,538, her engines, tackle, apparel, furniture and equipment, and against Robert F. Tobin, in a cause of wages and damages, civil and maritime, alleges as follows:

Action Under Special Rule for Seamen to Sue
Without Security and Prepayment of Fees.

I.

At the times herein mentioned the respondent oil screw vessel Silver Spray, was, and still is, a vessel documented under the laws of the United States, at the Port of Seattle, in this District, and owned by the respondent Robert F. Tobin, a resident of the City of Spokane, Washington.

II.

Said vessel is now moored in navigable waters within the Port of Seattle, and within the jurisdiction of this Honorable Court.

III.

That during the month of March, 1954, the respondent Robert F. Tobin, as master of the said vessel, hired this intervening libelant as a member of the crew of said vessel for the 1954 fishing season on a 1/10th share of the catch, and represented to him that said vessel would engage in fishing for tuna from San Diego, California.

IV.

That thereafter, and during the month of April,

1954, this intervening libelant joined the said vessel at Seattle, Washington, and engaged in work as a member of the crew thereof in preparing said vessel for sea.

V.

That during the month of May, 1954, respondent Tobin took the said vessel to Ketchikan, Alaska, on what was represented to be a shake-down cruise preliminary to the use of said ship for the tuna fishing season; that at Ketchikan, Alaska, said respondent Tobin unjustifiably and without cause discharged this intervening libelant and directed his removal from said vessel; that said intervening libelant has not received any wages whatsoever for the said voyage of the said vessel to Alaska or any wages whatsoever, and was discharged without his consent and without any fault on his part.

VI.

That on information and belief this intervening libelant's share of the catch during the 1954 tuna fishing season would have been worth the sum of \$5,000 had the said fishing venture been fulfilled as promised, and had this intervening libelant not been wrongfully discharged from the services of said vessel.

VII.

That this intervening libelant's services on board the said vessel during the months of March, April, May and June, 1954, was reasonably worth the sum of \$700.00.

VIII.

All and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court.

The intervening libel of Norman L. Bunker against the oil screw Silver Spray of Seattle, Washington, Official No. 250,538, her engines, tackle, apparel, furniture and equipment, and against Robert F. Tobin, in a cause of wages and damages, civil and maritime, alleges as follows:

Action Under Special Rule for Seamen to Sue Without Security and Prepayment of Fees.

I.

At the times herein mentioned the respondent oil screw vessel Silver Spray, was, and still is, a vessel documented under the laws of the United States, at the Port of Seattle, in this District, and owned by the respondent Robert F. Tobin, a resident of the City of Spokane, Washington.

II.

Said vessel is now moored in navigable waters within the Port of Seattle, and within the jurisdiction of this Honorable Court.

III.

That on or about June 2, 1954, respondent Robert F. Tobin, as master of the said vessel, hired intervening libellant Bunker as a member of the crew of said vessel for the 1954 tuna fishing season on a 1/10th share of the catch, and represented to him

that said vessel would engage in fishing for tuna from the Port of San Diego, California; that said respondent further represented to intervening libelant Bunker that there was an experienced bait and refrigeration man aboard said vessel, and that the same would be provisioned and sent to San Diego, California.

IV.

That thereafter and on or about June 4, 1954, intervening libelant Bunker joined the said vessel at Seattle, Washington, ready, willing and able to perform his duties in the service thereof; that this intervening libelant stood by, ready, willing, qualified and able to perform all duties and services required aboard said ship until approximately June 14, 1954; that respondent Tobin failed and refused to join said vessel and has ever since failed to provide the vessel with any funds, provisions or outfit, or to send said vessel to sea.

V.

That intervening libelant Bunker left said vessel at the Port of Seattle, Washington, the said owner being absent and his whereabouts unknown; that this intervening libelant has been discharged without receiving any wages whatsoever or the return of his consideration and without any fault on his part; the said vessel and its owner have ever since failed and refused to perform their said obligations under the agreement hereinbefore set out, thereby depriving this intervening libelant of his services and return of services to said ship had said agreement been fulfilled; that each and every perform-

ance required of this intervening libelant in the service of said vessel and of respondent Tobin have been performed.

VI.

On information and belief, this intervening libelant's share of the catch during the 1954 tuna fishing season would have been worth the sum of \$5,000.00, had the said fishing venture been fulfilled as promised to intervening libelant by the respondent Tobin.

VII.

All and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court.

Wherefore, intervening libelants pray:

1. That each of them shall be allowed to intervene and be heard in this cause and that all persons having any interest therein may be cited to appear and answer under oath all and singular the matters aforesaid;

2. That the said respondent, Robert F. Tobin, be required to appear and answer all and singular the matters aforesaid;

3. That the court enter a decree herein for intervening libelants John Kadlec, Doss R. Payne and Norman L. Bunker in the sum of \$5,000.00 and each intervening libelant's costs, respectively, and that said vessel, her engines, tackle, apparel, furniture and equipment, be sold in the manner provided by law to answer the decree for the amount adjudged due to intervening libelants herein, respec-

tively, and that intervening libelants respectively and each of them do have and recover of the respondent Robert F. Tobin the amount of any deficiency resulting from the sale of said vessel, and that judgment therefor against said respondent be entered herein in the manner provided by law;

4. That these intervening libelants have such other and further relief, respectively, as they may be entitled to receive herein.

/s/ ROBERT C. WELLS,
Proctor for Intervening Libelants.

Duly Verified.

[Endorsed]: Filed July 26, 1954.

In the United States District Court for the Western District of Washington, Northern Division

In Admiralty—No. 16039

HARRY C. LOWER, Libelant,
JOHN KADLEC, DOSS R. PAYNE and NORMAN L. BUNKER, Intervening Libelants,
WILLIAM E. BARQUIST and EDGAR L. PEECHER, Additional Intervening Libelants,

vs.

THE Oil Screw SILVER SPRAY, etc., et al.,
Respondents.

INTERVENING LIBEL

To the Honorable Judges of the Above Entitled Court:

The intervening libel of William E. Barquist

against the oil screw Silver Spray of Seattle, Washington, official No. 250,538, her engines, tackle, apparel, furniture and equipment, and against Robert F. Tobin, in a cause of wages and damages, civil and maritime, alleges as follows:

Action Under Special Rule for Seamen to Sue
Without Security and Prepayment of Fees.

I.

At the times herein mentioned the respondent oil screw vessel Silver Spray was, and still is, a vessel documented under the laws of the United States, at the Port of Seattle, in this District, and owned by the respondent Robert F. Tobin, a resident of the City of Spokane, Washington.

II.

Said vessel is now moored in navigable waters within the Port of Seattle, and within the jurisdiction of this Honorable Court.

III.

That on or about May 4, 1954 the respondent Robert F. Tobin, as master of said vessel, hired additional intervening libelant William E. Barquist as a member of the crew of said vessel for the 1954 tuna fishing season; that said additional intervening libelant was hired on the basis of 1/10th share of the catch; that it was represented to said additional intervening libelant that said vessel would engage in fishing for tuna during the 1954 fishing season from some port in the State of California.

IV.

That thereafter, and on or about May 4, 1954 this additional intervening libelant joined the said vessel at Seattle, Washington and engaged in work as a member of the crew thereof in preparing said vessel for sea.

V.

During the month of May, 1954 the respondent Tobin took the said vessel to Ketchikan, Alaska, on what was represented to this additional intervening libelant and the other crew members to be a shake-down cruize preliminary to taking it to San Diego for the tuna fishing season. The said respondent then left the vessel at the Port of Ketchikan, and abandoned her without notice to this additional intervening libelant or other members of the crew.

VI.

Said vessel returned to the Port of Seattle on or about June 3, 1954. The respondent Tobin then failed and refused to rejoin the vessel, and has since failed to provide the vessel with any funds, provisions or outfit to continue the season.

VII.

This additional intervening libelant left the said vessel approximately one month after boarding the vessel, the said owner being absent and his whereabouts unknown. This additional intervening libelant has been discharged, without receiving any wages whatsoever, and without his consent, and without any fault on his part.

VIII.

On information and belief, this additional intervening libelant's share of the catch during the 1954 tuna fishing season would have been worth the sum of \$5,000.00, had the said fishing venture been fulfilled as promised to additional intervening libelant by the respondent Tobin.

IX.

All and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court.

The intervening libel of Edgar L. Peecher against the oil screw Silver Spray of Seattle, Washington, official No. 250,538, her engines, tackle, apparel, furniture and equipment, and against Robert F. Tobin, in a cause of wages and damages, civil and maritime, alleges as follows:

Action Under Special Rule for Seamen to Sue
Without Security and Prepayment of Fees.

I.

At the times herein mentioned the respondent oil screw vessel Silver Spray was, and still is, a vessel documented under the laws of the United States, at the Port of Seattle, in this District, and owned by the respondent, Robert F. Tobin, a resident of the City of Spokane, Washington.

II.

Said vessel is now moored in navigable waters

within the Port of Seattle, and within the jurisdiction of this Honorable Court.

III.

That during the month of April, 1954, the respondent Robert F. Tobin, as master of the said vessel, hired this additional intervening libelant as a member of the crew of said vessel for the 1954 fishing season on a 1/10th share of the catch, and represented to him that said vessel would engage in fishing for tuna from San Diego, California.

IV.

That thereafter, and during the month of April, 1954, this additional intervening libelant joined the said vessel at Seattle, Washington, and engaged in work as a member of the crew thereof in preparing said vessel for sea.

V.

During the month of May, 1954 the respondent Tobin took the said vessel to Ketchikan, Alaska, on what was represented to this additional intervening libelant and the other crew members to be a shake-down cruise preliminary to taking it to San Diego for the tuna fishing season. The said respondent then left the vessel at the Port of Ketchikan, and abandoned her without notice to this additional intervening libelant or other members of the crew.

VI.

Said vessel returned to the Port of Seattle on or about June 3, 1954. The respondent Tobin then

failed and refused to rejoin the vessel, and has since failed to provide the vessel with any funds, provisions or outfit to continue the season.

VII.

This additional intervening libelant left the said vessel approximately one month after boarding the vessel, the said owner being absent and his whereabouts unknown. This additional intervening libelant has been discharged, without receiving any wages whatsoever, and without his consent, and without any fault on his part.

VIII.

That on information and belief this additional intervening libelant's share of the catch during the 1954 tuna fishing season would have been worth the sum of \$5,000.00 had the said fishing venture been fulfilled as promised, and had this additional intervening libelant not been wrongfully discharged from the services of said vessel.

IX.

All and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court.

Wherefore, additional intervening libelants pray:

1. That each of them shall be allowed to intervene and be heard in this cause and that all persons having any interest therein may be cited to

appear and answer under oath all and singular the matters aforesaid;

2. That the said respondent, Robert F. Tobin, be required to appear and answer all and singular the matters aforesaid;

3. That the court enter a decree herein for additional intervening libelants, William E. Barquest and Edgar L. Peecher, in the sum of \$5,000.00 each and each additional intervening libelant's costs, respectively, and that said vessel, her engines, tackle, apparel, furniture and equipment, be sold in the manner provided by law to answer the decree for the amount adjudged due to additional intervening libelants herein, respectively, and that additional intervening libelants respectively, and each of them, do have and recover of the respondent Robert F. Tobin the amount of any deficiency resulting from the sale of said vessel, and that judgment therefor against said respondent be entered herein in the manner provided by law.

4. That these additional intervening libelants have such other and further relief, respectively, as they may be entitled to receive herein.

/s/ LEWIS S. ARMSTRONG,

Proctor for Additional Intervening
Libelants.

Acknowledgment of Service attached.

Duly Verified.

[Endorsed]: Lodged August 12, 1954.

[Endorsed]: Filed August 16, 1954.

In the United States District Court for the Western District of Washington, Northern Division

In Admiralty—No. 16039

HARRY C. LOWER, Libelant,
JOHN KADLEC, et al., Intervening Libelants,
GEORGE S. HERNING, Intervening Libelant,

vs.

THE Oil Screw SILVER SPRAY, etc., et al.,
Respondents.

INTERVENING LIBEL

To the Honorable Judges of the Above Entitled Court:

The intervening libel of George S. Herning against the Oil Screw Silver Spray of Seattle, Washington, Official No. 250,538, her engines, tackle, apparel, furniture and equipment, and against Robert F. Tobin, in a cause of wages and damages, civil and maritime, alleges as follows:

Action Under Special Rule for Seamen to Sue
Without Security and Prepayment of Fees.

I.

At the times herein mentioned the respondent oil screw vessel Silver Spray, was, and still is, a vessel documented under the laws of the United States, at the Port of Seattle, in this District, and owned by the respondent Robert F. Tobin, a resident of the City of Spokane, Washington.

II.

Said vessel is now moored in navigable waters within the Port of Seattle, and within the jurisdiction of this Honorable Court.

III.

That on or about the 27th day of April, 1954, the respondent Robert F. Tobin, as master of said vessel, hired intervening libelant Herning as a member of the crew of said vessel for the 1954 tuna fishing season; that said intervening libelant was hired on the basis of 1/10th share of the catch; that it was represented to said intervening libelant that said vessel would engage in fishing for tuna during the 1954 fishing season from some port in the State of California.

IV.

That thereafter, and on or about April 28, 1954, this intervening libelant joined the said vessel at Seattle, Washington and engaged in work as a member of the crew thereof in preparing said vessel for sea.

V.

During the month of May, 1954 the respondent Tobin took the said vessel to Ketchikan, Alaska, on what was represented to this intervening libelant and the other crew members to be a shake-down cruise preliminary to taking it to San Diego for the tuna fishing season. The said respondent then left the vessel at the Port of Ketchikan, and abandoned her without notice to this intervening libelant or other members of the crew.

VI.

Said vessel returned to the Port of Seattle on or about June 3, 1954. The respondent Tobin then failed and refused to rejoin the vessel, and has since failed to provide the vessel with any funds, provisions or outfit to continue the season.

VII.

This intervening libelant left the said vessel at the Port of Seattle on June 5, 1954, the said owner being absent and his whereabouts still unknown. This intervening libelant has been discharged, without receiving any wages whatsoever, and without his consent, and without any fault on his part.

VIII.

On information and belief, this intervening libelant's share of the catch during the 1954 tuna fishing season would have been worth the sum of \$5,000.00, had the said fishing venture been fulfilled as promised to intervening libelant by the respondent Tobin.

IX.

This intervening libelant's services on board the said vessel between April 28, 1954 and June 5, 1954, were reasonably worth the sum of \$800.00.

X.

All and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court.

Wherefore, intervening libelant prays:

1. That he shall be entitled to intervene and be heard in this cause and that all persons having any interest therein may be cited to appear and answer under oath all and singular the matters aforesaid;

2. That the said respondent, Robert F. Tobin, be required to appear and answer all and singular the matters aforesaid;

3. That the court enter a decree herein for intervening libelant George S. Herning in the sum of \$5,000.00 and intervening libelant's costs, and that said vessel, her engines, tackle, apparel, furniture and equipment, be sold in the manner provided by law to answer the decree for the amount adjudged due to intervening libelant herein, and that intervening libelant have and recover of the respondent Robert F. Tobin the amount of any deficiency resulting from the sale of said vessel, and that judgment therefor against said respondent be entered herein in the manner provided by law;

4. That the intervening libelant have such other and further relief as he may be entitled to receive herein.

/s/ ROBERT B. ALLISON,
Proctor for Intervening Libelant.

Acknowledgment of Service attached.

[Endorsed]: Lodged August 12, 1954.

[Endorsed]: Filed August 16, 1954.

[Title of District Court and Cause.]

ORDER AUTHORIZING WITHDRAWAL OF PROCTOR

This matter having come on for hearing on August 16, 1954, upon the motion of Robert C. Wells for an order authorizing his withdrawal as proctor for intervening libelants John Kadlec, said motion being supported by the affidavit of said Payne and the affidavit of said Kadlec, containing the written consent of said intervening libelants to the withdrawal of said Robert C. Wells, and upon the affidavit of said Wells that differences have arisen between him and said intervening libelants and that said intervening libelants intended to proceed herein with other counsel, and the Court having considered the records and files herein and being fully informed in the premises, it is now

Ordered that the motion for order authorizing withdrawal as proctor by Robert C. Wells, should be, and the same is hereby granted as to John Kadlec.

Done in Open Court this 16th day of August, 1954.

/s/ JOHN C. BOWEN,
Judge.

Approved and presented by:

/s/ ROBERT C. WELLS,

Proctor for Intervening Libelants.

Approved and Notice of Presentation Waived:

/s/ M. BAYARD CRUTCHER,
of Proctor for Libelant.

Copy received and approved as to form:

/s/ LEONARD COLLINS,
of Proctors for Respondent and
Claimant, Robert F. Tobin.

Copy received and approved as to form:

/s/ LEWIS S. ARMSTRONG,
Proctor for additional intervening
libelants.

Copy received and approved as to form:

/s/ ROBERT B. ALLISON,
Proctor for intervening libelant,
George S. Herning.

Acknowledgment of Service attached.

[Endorsed]: Filed August 16, 1954.

In the United States District Court for the Western District of Washington, Northern Division

In Admiralty—No. 16039

HARRY C. LOWER, Libelant,
vs.

THE Oil Screw SILVER SPRAY, etc., et al.,
Respondents.

JOHN KADLEC, et al., Intervening Libelants,
FRED I. PUTNAM and JAMES A. OVERMAN,
Additional Intervening Libelant.

INTERVENING LIBEL IN REM AND IN
PERSONAM

To the Honorable Judges of the United States District Court for the Western District of Washington, Northern Division:

Come now Fred I. Putnam and James A. Overman, intervening libelants in rem and in personam, and allege as follows:

I.

The Oil Screw "Silver Spray", respondent, registered for fishing and freight; length 77.5 feet, breadth 15.1 feet, depth 7.8 feet; is now within the Western District of Washington, Northern Division, and within the jurisdiction of this Honorable Court, and all libellants and the respondents above named, as parties to these admiralty proceedings are within the jurisdiction of this Honorable Court.

II.

Prior to April 28, 1954, these intervening libelants (hereinafter referred to as "Putnam" and "Overman") agreed to sell and did sell the Oil Screw "Silver Spray" to respondent Robert F. Tobin (hereinafter referred to as "Tobin") for the agreed purchase price of \$35,000.00, of which Tobin made a down payment of \$5,000.00, and on April 28, 1954, Tobin, as evidence of the balance due, executed and delivered to Putnam and Overman his promissory note in the principal sum of \$30,000.00 with the following conditions and provisions, namely:

\$30,000.00 Instalment Note No.....

Seattle, Wash., April 28, 1954

For value received, I promise to pay to the order of Fred I. Putnam and James A. Overman, seven-twelfths and five-twelfths, respectively, Thirty Thousand and 00/100 (\$30,000.00) Dollars in Lawful Money of the United States of America, with interest thereon in like Lawful Money at the rate of 5 per cent per annum from date until paid, payable in 2 installments each year \$2500 or more in any one payment, including the full amount of interest due on this note at time of payment of each instalment. The first payment to be made on the 1st day of September, 1954, and a like payment on each June 1st and each September 1st thereafter until the whole sum, principal and interest, has been paid; if any of said instalments are not so paid, the whole sum of both principal and interest to become immediately due and collectible at the option of the

holder hereof. And in case suit or action is instituted to collect this note, or any portion thereof, I promise to pay such additional sum as the Court may adjudge reasonable as attorney's fees in said suit or action.

Due September 1, 1961 at Seattle, Washington.

ROBERT J. TOBIN

(Robert J. Tobin)

III.

In order to secure the payment of the principal and interest of said promissory note above set forth, Tobin, as mortgagor, executed and delivered to Putnam and Overman, as mortgagees, a first, preferred mortgage dated April 28, 1954, and by the terms and provisions of said first, preferred mortgage Tobin admitted that he was justly indebted to Putnam and Overman as mortgagees in the sum of \$30,000.00, plus interest as therein provided, and granted, bargained, sold, and mortgaged unto said mortgagees the whole of the said Oil Screw "Silver Spray", together with her mast, bowsprit, boats, anchors, cables, chains, rigging, tackle, apparel, furniture and all other necessities thereunto pertaining and belonging, and said mortgage provided that if Tobin should pay or cause to be paid to the said mortgagees the debt aforesaid, together with interest as provided, and if said mortgagor should keep, perform and observe all and singular the covenants and promises in said promissory note and in the said mortgage, then the said mortgage and

the estate and rights thereby granted should cease, determine and be void; otherwise, to remain in full force and effect. That in fact Tobin violated the provisions of said mortgage in the following particulars:

1. By his failure to pay premiums he has caused a forfeiture of insurance coverage as provided for in the mortgage.

2. He has permitted the "Silver Spray" to be attached by The United States Marshal of this district.

3. He has declared that he cannot, and will not, make the \$2500.00 payment due September 1, 1954 as provided for in said promissory note.

4. By such violations the mortgagees deem themselves in danger of losing the debt and the whole thereof.

IV.

At the time the said first, preferred mortgage was executed, the said Oil Screw "Silver Spray" was and still is duly registered under the laws of the United States of America, having its home port at Seattle, State of Washington. The said first, preferred mortgage was duly filed for record in the Office of the Collector of Customs of the Port of Seattle, State of Washington, and was duly recorded in said Office of the Collector of Customs in Book No. 15PM, instrument No. 95, at 2:20 o'clock p.m. on the 28th day of April, 1954, which said record shows the name of the vessel, the names of the parties to the mortgage, the interest in the vessel mortgaged, and the amount and date of maturity

on September 1, 1961, in accordance with Section 30, subsection "c" of the Ship Mortgage Act of Congress of the United States, June 5, 1920.

The said first, preferred mortgage was endorsed upon the documents of the Oil Screw "Silver Spray" in accordance with the provisions of Section 30 of the Ship Mortgage Act of June 5, 1920, and was recorded as provided by subsection "c" thereof. An affidavit was endorsed upon the said mortgage to the effect that the mortgage was made in good faith and without any design to hinder, delay or defraud any existing or future creditor of the mortgagor or any lienor of the mortgaged vessel. The said mortgage expressly provided that the mortgagee did not waive the preferred status of said mortgage. All of the acts and things required to be done by the said Ship Mortgage Act of June 5, 1920 in order to give to the said mortgage status of a first, preferred mortgage, were duly done or caused to be done, either by mortgagee or by Collector of Customs of the Port of Seattle, State of Washington.

VI.

The Collector of Customs of the Port of Seattle, State of Washington, upon recording of said first, preferred mortgage, delivered two certified copies thereof to the mortgagor who placed and used due diligence to retain one copy on board the said vessel to be exhibited by the master to any person having business with the vessel which might give rise to a maritime lien upon the vessel, or to the sale, conveyance of mortgage thereof; and these mortgagees

allege upon information and belief that at all times since then the master of said vessel upon the request of any such person has exhibited to him the documents of said vessel and the copy of said first, preferred mortgage placed on board thereof. That upon the date of the execution of said mortgage, namely April 28, 1954, the mortgagor Tobin acknowledged receipt of two certified copies of the said mortgage; and on said date and upon the same instrument, Tobin as master of said vessel acknowledged receipt of one certified copy of said mortgage for placement on board the vessel. Further, upon said date, the said Tobin executed a certain prior and subsequent liens affidavit in favor of mortgagees Putnam and Overman wherein he certified there were no prior liens or obligations to his knowledge, further, there would not be future liens incurred without the consent of the mortgagees, with certain exceptions.

VII.

That Tobin, by reason of his violations of the terms and provisions of said mortgage, has forfeited all right, title, and interest in and to the Oil Screw "Silver Spray" and Putnam and Overman are entitled to a foreclosure of said mortgage. There is now due and owing upon said promissory note a principal balance of \$30,000.00 together with interest thereon at the rate of 5% per annum from April 28, 1954. Said promissory note provided that in the event suit is instituted to collect the amount due and owing the maker Tobin shall pay such additional sums as the Court may adjudge reasonable

as attorney's fees, and the sum of \$3000.00 is reasonable to be awarded to Putnam and Overman for and as proctor's fees herein. That said sums, together with all costs of suit, Marshal's charges, and costs of sale are within the lien of said first, preferred mortgage and chargeable to the proceeds of the Oil Screw "Silver Spray" upon due and regular foreclosure proceedings.

VIII.

The original libel filed herein together with the intervening libels were instituted for fishing shares for the 1954 season if the fishing venture had been fulfilled, and the libellant and intervening libellants claim, or may claim, to have a lien for shares against the vessel. Putnam and Overman allege that none of said libellants have a lien against the vessel, and if they claim to have liens they are junior, inferior and subordinate to the first, preferred mortgage lien against the Oil Screw "Silver Spray".

That all and singular the premises are within the admiralty jurisdiction of this Honorable Court.

Wherefore, intervening libellants Putnam and Overman Pray:

1. That process in due form of law according to the course and practice of this Honorable Court in causes of admiralty and maritime jurisdiction may issue against the said Oil Screw "Silver Spray", her mast, bowsprit, boats, anchors, cables, chains, rigging, tackle, apparel, furniture, and all other necessities thereunto appertaining and belonging;

that all persons claiming any interest in the said vessel may be cited to appear and answer the matters aforesaid, and that the vessel and appurtenances described may be condemned and sold to pay the demands and claims aforesaid, namely, the sum of \$30,000.00 together with interest at the rate of 5% per annum from April 28, 1954 until paid; and in addition thereto, the sum of \$3000.00 as a reasonable proctor's fee, together with costs of suit, costs of foreclosure, Marshal's charges and to pay any and all other amounts required to be paid by the mortgagor to the mortgagee under the said first, preferred mortgage for which evidence may be offered and proof be made.

2. That the said first, preferred mortgage dated April 28, 1954, be declared to be a valid and subsisting first and prior lien upon the Oil Screw "Silver Spray" and appurtenances, prior and superior to the interests, liens or claims of any and all persons, firms or corporations whatsoever, and particularly prior and superior to the claims of the libellant and other intervening libellants herein and each of them.

3. That in the default of the payment of all sums found due and payable to your intervening libellant under the said promissory note and first, preferred mortgage within the time to be limited by a decree of this Honorable Court, it may be decreed that any and all persons, firms and corporations claiming any interest in the said respondent vessel are forever barred and foreclosed of and from all right or equity of redemption, or claim of,

in or to the said mortgaged respondent vessel and her appurtenances and every part thereof.

4. That in due form and by due process a citation be issued to the respondent Robert J. Tobin to appear and answer the allegations of this libel, or upon his failure to do so, a default in due course be entered against said respondent, and libellant further prays that a judgment be entered against said respondent for such deficiency as may result and be represented by the difference between libellants' total recovery as herein prayed for and the amount recovered upon due and regular sale of said respondent vessel by the United States Marshal.

5. That these intervening libellants Putnam and Overman may have such further relief as in law and justice they may be entitled to receive.

/s/ STEPHEN V. CAREY,

Proctor for Intervening Libellants Fred I. Putnam
and James A. Overman.

Acknowledgment of Service attached.

Duly Verified.

[Endorsed]: Filed August 25, 1954.

[Title of District Court and Cause.]

MONITION AND ATTACHMENT

The President of the United States of America
To the Marshal of the United States for the West-
ern District of Washington, Greeting:

Whereas, an intervening Libel hath been filed in

the United States District Court for the Western District of Washington, on the 25th day of August, in the year of our Lord one thousand nine hundred and fifty-four, by Fred I. Putnam and James A. Overman for the reasons and causes in the said Intervening Libel mentioned, and praying the usual process and monition of the said Court in that behalf be made, and that all persons interested in the said Oil Screw Vessel Silver Spray, her engines, tackle, apparel, furniture and equipment, or vessel, her tackle, etc., may be cited in general and special to answer the premises, and all proceedings being had that the said Oil Screw Vessel Silver Spray, her engines, tackle, apparel, furniture and equipment or vessel, her tackle, etc., may for the causes in the said Intervening Libel mentioned, be condemned and sold to pay the demands of the Libellant.

You Are Therefore Hereby Commanded to attach the said Oil Screw Vessel Silver Spray, her engines, tackle, apparel, furniture and equipment, or vessel, her tackle, etc., and to retain the same in your custody until the further order of the Court respecting the same, and to give due notice to all persons claiming the same, or knowing or having anything to say why the same should not be condemned and sold pursuant to the prayer of the said Libel, that they be and appear before the said Court, to be held at Seattle, in the Western District of Washington, on the 14th day September, A.D. 1954, at 10 o'clock in the forenoon of the same day, if that day shall be a day of Jurisdiction, otherwise on the next day of

Jurisdiction thereafter, then and there to interpose a claim for the same, and to make their allegations in that behalf. And what you shall have done in the premises do you then and there make return thereof together with this writ.

Witness, the Hon. John C. Bowen, Judge of said Court, at the City of Seattle, in the Western District of Washington, this 25th day of August, in the year of our Lord one thousand nine hundred and fifty-four and of our independence the one hundred and seventy-ninth.

MILLARD P. THOMAS, Clerk

/s/ By MARION MILLER, Deputy Clerk

Marshal's Return

I hereby certify and return that in obedience to the attached Monition and Attachment, I attached the Oil Screw Vessel Silver Spray, her engines, tackle, apparel, furniture and equipment, at Seattle, Washington, on the 26th day of August, 1954, and have her in my custody. I have given due notice to all persons claiming the same, or knowing or having anything to say why same should not be condemned and sold pursuant to the prayer of Intervening Libel, that they be and appear before this Court to be held at Seattle in the Western District of Washington, on the 14th day of September, 1954, by causing a Notice to be published in The Daily Journal of Commerce, Seattle, Washington, on the 27th day of August, 1954, and by posting like Notice on the seized Oil Screw Vessel Silver Spray, at

Lake Union Drydock, 1515 Fairview Avenue North, Seattle, Washington.

A true copy of the Monition and Attachment, with copy of the Intervening Libel in Rem and In Personam, was served on Frank H. Oliver, Superintendent, Lake Union Drydock, 1515 Fairview Avenue North, Seattle, Washington, in whose custody I found the Oil Screw Vessel Silver Spray.

W. B. PARSONS, U. S. Marshal
/s/ By PYRL J. FORCIER, Deputy

Marshal's fee, \$2.00; Expense, 40c; Advertising, \$14.80; Total, \$17.20.

Affidavit of Publication

State of Washington,
County of King—ss.

L. J. Brown, being first duly sworn, on oath deposes and says that he is the business manager and one of the publishers of The Daily Journal of Commerce, a daily newspaper. That said newspaper is a legal newspaper and it is now and has been for more than six months prior to the date of the publication hereinafter referred to, published in the English language continuously as a daily newspaper in Seattle, King County, Washington, and it is now and during all of said time was printed in an office maintained at the aforesaid place of publication of said newspaper. That the said Daily Journal of Commerce was on the 12th day of June, 1941, ap-

proved as a legal newspaper by the Superior Court of said King County.

That the annexed is a true copy of U. S. Marshal Notice as it was published in the regular issue (and not in supplement form) of said newspaper on the 27th day of August, 1954, and that said newspaper was regularly distributed to its subscribers during all of said period.

/s/ L. J. BROWN

Subscribed and sworn to before me this 27th day of August, 1954.

[Seal] /s/ E. CAMPBELL,
Notary Public in and for the State of Washington,
residing at Seattle.

U. S. Marshal's Notices

Notice. Whereas, on the 25th day of August, 1954, Fred I. Putnam and James A. Overman, Intervening Libelants, by Stephen V. Carey of Seattle, Washington, Proctors for Libelant, filed an intervening libel in the District Court of the United States for the Western District of Washington, against the Oil Screw Vessel Silver Spray, her engines, tackle, apparel, furniture and equipment, in a cause of action civil and maritime, numbered 16039, for Preferred Mortgage in the sum of \$30,000.00 with interest. And whereas, by virtue of process in due form of law, to me directed, I have attached and retain the same in my custody. Notice is hereby given to all persons claiming the same, or knowing or having anything to say why the same

should not be condemned and sold pursuant to the prayer of the said Intervening Libel, that they be and appear before the said court, to be held at Seattle, Washington, in the Western District of Washington, on the 14th day of September, A.D. 1954, at ten o'clock in the forenoon of the same day, if that day shall be a day of Jurisdiction, otherwise on the next day of Jurisdiction thereafter, then and there to interpose a claim for the same, and to make their allegations in that behalf. W. B. Parsons, U. S. Marshal. (4172-M)

[Endorsed] Filed August 30, 1954.

[Title of District Court and Cause.]

ANSWER AND AFFIRMATIVE DEFENSES
OF RESPONDENT TOBIN TO LIBEL
AND INTERVENING LIBELS OF LOWER,
BUNKER, HERNING, PEECHER AND
BARQUIST

To the Honorable Judges of the Above Entitled
Court:

Comes now the respondent Robert J. Tobin and in answer to the libel and intervening libels as above designated denies and alleges as follows:

I.

In answer to the libel and said intervening libels collectively, respondent admits that each of the said libelants were entitled to a 1/10th share of the catch; and further admits the vessel sailed on a shake-down cruise to Alaska; and further admits

the vessel returned to Seattle and the libelants left the vessel.

Respondent denies each and every other allegation contained in the libel and intervening libels and demands strict proof thereof.

As and for a First Affirmative Defense respondent alleges:

Each of the libelants appearing in the above caption signed a fishing share agreement on the Silver Spray in form as attached hereto as Exhibit A, the terms of which are incorporated herein as though set forth in full. Each of the libelants became dissatisfied with the proposed venture but violated said contract by refusing to give respondent 30 days oral notice of intention to withdraw from the venture. The contract further provides that in the event libelants or any of them leaves the vessel or is dismissed the respondent shall have ninety days within which to sell shares and make full refunds of the amounts invested by libelants. The libelants further violated the contract by causing a seizure of the vessel by the United States Marshal thus preventing respondent to sell the working shares and make full refunds.

As and for a Second Affirmative Defense respondent alleges:

None of the libelants has had fishing or sailing experience and each was fully informed and well knew the risks attendant upon tuna fishing and that

under such circumstances wages could not be and were not contracted for or agreed upon either for the shake-down cruise to Alaska or thereafter, and each libelant was informed and knew that earnings, if any, were to be charged against fishing profits, if any, at the end of the voyage.

That not being seamen suing for, or entitled to, wages, none of the libelants are entitled to any relief under 28 USCA 1916 without prepaying costs and posting security.

As and for a Third Affirmative Defense respondent alleges:

At all times up to the seizure of the vessel by the United States Marshal, the respondent was willing to continue with the proposed fishing operation, but upon return to the Port of Seattle the libelants entirely upon their own initiative and volition quit the vessel. Libelants did not and do not have maritime liens for speculative and prospective profits on fish that were not caught, and by causing the vessel to be wrongfully seized, the libelants have caused respondent to suffer damages by substantial monetary losses at the rate of \$100.00 per day from seizure, and their wrongful acts have prevented respondent from operating the vessel and thus have induced a foreclosure of a preferred mortgage with a consequent loss of respondent's ownership.

In the event the Court finds respondent obligated to libelants in personam it is fitting and proper to ascertain and fix respondent's losses and damages

and to set them off against any amounts due libelants.

Wherefore, having fully answered the libel, respondent prays that it be dismissed and that said vessel be released from monition and attachment and that he recover his costs herein incurred; further, in the event libelants are entitled to a personam judgment against respondent that he be adjudged to have a set off against libelants for all damages resulting for breach of contract and wrongful seizure of the vessel; further for such other relief as may be meet and equitable in the premises.

ANDERSON & COLLINS,
/s/ By LEONARD COLLINS,
Proctors for Respondent

Duly Verified.

Acknowledgment of Service attached.

EXHIBIT "A"

WORKING SHARE AND CONTRACT ON
TUNA CLIPPER SILVER SPRAY
OWNED AND OPERATED BY R. J.
TOBIN

This Agreement made and entered into this....
day of....., 1954, by and between R. J.
Tobin, hereinafter termed party of the first part,
and.....hereinafter termed party of the second
part, provides that

1. In consideration of the sum of \$. paid by the second party, the first party agrees to sell one working share in the fishing boat. owned by the first party.

2. The first party shall furnish all fuel, food, gear, and second party shall work under orders of first party or whomever the first party shall designate as Captain.

3. All boat movement and fishing operation shall be controlled by first party.

4. The location of the fishing operation shall be in southern waters or wherever designated by party of the first part.

5. The boat. shall carry. working shares to be divided as follows: one-half to the boat owner or party of the first part, and one-half to the crew who are shareholders.

6. In the event the party of the second part becomes dissatisfied with the working share he will give 30 days oral notice to party of the first part, which will enable first party to replace second party without hindering the operation of the boat.

7. In the event the second party desires to sell his share in the boat, the purchaser must be approved by the first party.

8. If the second party leaves or is dismissed from service, the first party will sell the working share for second party within 90 days of leaving the boat and give him full refund.

9. If the second party leaves the boat of his own free will and volition, he shall pay his own expenses to the point of departure, viz., Seattle.

10. If the second party proves unsatisfactory to the first party, the first party may terminate this agreement immediately, and the above conditions with regard to selling working shares shall then apply, provided, however, that if the first party terminates the agreement the first party shall pay the fare of the second party back to the point of departure, viz., Seattle.

11. In the event party of the first part shall decide to go out of business, the boat and equipment will be sold and shareholders paid off.

12. The party of the second part agrees to settle any difference with the first party and to arbitrarily do nothing whatsoever to hinder the operation of the boat and crew.

13. It is further understood that the first party is not responsible for life or limb of second party, and the second party thoroughly understands the hazards and risks of the venture.

14. This agreement by mutual consent of both parties may be made to apply to any other boat operated by first party insofar as he sees fit to adaptability of the second party.

15. In Witness Whereof the parties have caused

this agreement to be executed the day and year first
above written at.....

.....,

First Party

.....,

Second Party

[Endorsed]: Filed September 2, 1954.

—

[Title of District Court and Cause.]

REPLY OF LIBELANT HARRY C. LOWER

To the Honorable the Judges of the Above Entitled
Court:

The reply of the libelant Harry C. Lower to the
answer of the respondent Robert J. Tobin on file
in this case alleges:

I.

Admits that libelant signed a purported working
share and contract prepared by the said respondent,
at Spokane, Washington, on April 17, 1954. Except
as thus admitted, libelant denies the allegations of
paragraph II.

II.

At the time referred to above, libelant had never
served on a commercial fishing vessel, and had no
experience with or knowledge about commercial
fishing. On the same date, respondent represented
to libelant that he was the owner of an 80 foot tuna
fishing vessel called the Silver Spray; that said

vessel was equipped to fish for tuna, and that a crew was already employed on shares, except for one vacancy; that respondent had had previous experience in commercial fishing as owner and operator of two vessels; that respondent had entered into a contract with Van Camp Sea Food Co., Inc., to fish for tuna out of San Diego, California, for the 1954 season, using the said vessel Silver Spray; that respondent then planned and was prepared to take the vessel south to San Diego from Puget Sound by May 15, 1954, for the 1954 tuna fishing season. Said representations were made to libelant for the purpose of inducing him to sign the aforesaid agreement, and libelant agreed to work aboard the said vessel for a tenth of the catch by virtue thereof.

III.

The aforesaid representations by respondent were false, and were made by him with intent to deceive libelant so that the said writing prepared by respondent and then executed by libelant as aforesaid, and as alleged by respondent in answer to the libel, is null and void, and of no effect.

IV.

Further replying to said answer, libelant admits that he had had no fishing experience, and that no wages in specific sum were agreed to, but otherwise libelant has no knowledge or information sufficient to form a belief as to the truth of the matters alleged in paragraph III, and therefore denies the same.

V.

Libelant denies the allegations of paragraph IV of said answer.

Wherefore, libelant prays that the affirmative defenses alleged by respondent be denied, and that he have a decree as prayed for in his libel.

/s/ BOGLE, BOGLE & GATES,

/s/ CLAUDE E. WAKEFIELD,

/s/ M. BAYARD CRUTCHER,

Proctors for Libelant

Duly Verified.

Acknowledgment of Service attached.

[Endorsed]: Filed September 8, 1954.

[Title of District Court and Cause.]

REPLY OF INTERVENING LIBELANT
NORMAN BUNKER

To the Honorable The Judges of the Above Entitled Court:

The reply of intervening libelant Norman Bunker to the affirmative defenses set forth in the Answer of respondent Tobin on file in this cause, alleges:

I.

Admits that intervening libelant signed a purported working share and contract prepared by said respondent at Seattle, Washington, on June 2, 1954, and denies all remaining allegations of respondent's First Affirmative Defense.

II.

That intervening libelant had never served on a commercial fishing vessel, but held an unlimited master's license and had considerable deep water experience as a merchant mariner but no experience with, or knowledge about commercial fishing. That on June 2, 1954 and prior thereto, respondent represented to intervening libelant that he was the sole owner of a tuna fishing vessel called, "Silver Spray;" that said vessel was equipped to fish for tuna and that respondent had ample funds to successfully provide and maintain the venture and that a crew was already employed on shares, including an experienced bait man and an experienced refrigerator man, two positions most important to the venture; that there was one vacancy on the crew, which vacancy was represented to be that of navigator; that intervening libelant was qualified to navigate said vessel. That respondent had entered into a contract with Van Camp Sea Food Co., Inc., to fish for tuna south of San Diego, California for the 1954 season using said vessel "Silver Spray." That said fishing company would operate a helicopter to assist in locating tuna fish; that respondent then planned and was prepared to take the vessel south to San Diego, leaving from Puget Sound on June 11 or 12, 1954, for the 1954 tuna fishing season. That said representations were made to intervening libelant for the purpose of inducing him to sign the aforesaid agreement, and intervening libelant agreed to work aboard said vessel for a tenth of the catch by virtue thereof.

III.

That the aforesaid representations by respondent were false, and were made by him with intent to deceive intervening libelant, so that said writing prepared by respondent and executed by intervening libelant as aforesaid and alleged by respondent in his Answer herein, is null and void and of no effect.

IV.

That intervening libelant admits that he had no fishing experience, and that no wage in specific sum was agreed to, but otherwise intervening libelant specifically denies all other matters alleged in respondent's Second Affirmative Defense.

V.

That intervening libelant denies each and every allegation contained in respondent's Third Affirmative Defense and the whole thereof.

Wherefore, intervening libelant prays that the affirmative defenses as alleged by respondent be denied, and that he have a decree as prayed for in his intervening libel herein.

/s/ ROBERT C. WELLS,

Proctor for Intervening Libelant
Bunker.

Duly Verified.

Acknowledgment of Service attached.

[Endorsed]: Filed September 10, 1954.

[Title of District Court and Cause.]

REPLY OF INTERVENING LIBELANT
GEORGE S. HERNING

To the Honorable the Judges of the Above Entitled
Court:

The reply of the intervening libelant George S. Herning to the answer of the respondent Robert J. Tobin on file in this cause alleges:

I.

The intervening libelant George S. Herning admits that he signed a purported working share contract prepared by said respondent on the 27th day of April, 1954, but denies each and every other allegation contained in paragraph 1 of the answer.

II.

The intervening libelant George S. Herning denies each and every allegation contained in the first affirmative defense of the respondent Robert J. Tobin and particularly denies that he has violated the alleged contract in any manner whatsoever.

III.

The intervening libelant further denies the second affirmative defense of the respondent Robert J. Tobin and particularly denies that he had had no fishing or sailing experience whatsoever but on the contrary alleges that he had fished previously for salmon in Alaskan waters and that he had experi-

ence as an engineer aboard fishing vessels and had so served. The intervening libelant further alleges that after he went aboard the SS Silver Spray he was assigned to engineering duties and did so perform aboard the SS Silver Spray as alleged in the intervening libel on file herein.

IV.

The intervening libelant George S. Herning further denies each and every allegation set forth in the third affirmative defense of the respondent Robert J. Tobin and particularly denies that he has caused the respondent to suffer damages at the rate of \$100.00 per day or any other sum whatsoever.

V.

The intervening libelant denies each and every other allegation contained in the answer and affirmative defenses of the respondent Tobin which he has not specifically denied hereinabove.

Wherefore, intervening libelant prays that the affirmative defenses alleged by the respondent be denied, that he have a decree as prayed for in his intervening libel.

/s/ ROBERT B. ALLISON,
Proctor for Intervening Libelant
George S. Herning.

Duly Verified.

Acknowledgment of Service attached.

[Endorsed]: Filed September 13, 1954.

[Title of District Court and Cause.]

REPLY OF INTERVENING LIBELANTS
EDGAR L. PEECHER AND WILLIAM E.
BARQUIST.

To the Honorable Judges of the Above Entitled
Court:

The reply of the intervening libelant, Edgar L. Peecher to the answer and affirmative defense of the respondent, Robert J. Tobin, on file in this case, alleges:

I.

Edgar L. Peecher admits that he signed a purporting working share and contract prepared by the said respondent at Seattle, Washington on May 4, 1954. Except as thus admitted, this libelant denies the allegations of respondent's first affirmative defense.

II.

At the time referred to above, Edgar L. Peecher had never served on a commercial fishing vessel and had no experience with or knowledge about commercial fishing and so informed the respondent, Robert J. Tobin. The respondent, Robert J. Tobin, represented to this intervening libelant that he was the owner of an 80 foot tuna clipper called the "Silver Spray"; that the said vessel was to be equipped or was equipped for clipper tuna fishing, and that in the crew which was already employed there were two experienced tuna fishermen plus the experience of the respondent, Tobin, of three years' fishing experience in Alaska; that the vessel had

been chartered with Van Camp Sea Food Co., Inc. to fish for tuna out of San Diego, California for the 1954 season, to arrive in San Diego, California not later than June 1, 1954. That as a result of the said representations, this intervening libelant was induced to quit his job at the Pacific Car & Foundry Co., Renton, Washington at the salary of \$92.00 a week, and to advance to the respondent, Robert J. Tobin, the sum of \$2,500.00 for a working share on the said "Silver Spray" in return for a one-tenth of the catch of the vessel.

III.

That the aforesaid representations by the respondent were false and were made by him with the intent to deceive intervening libelant, and said writing prepared by the respondent and then executed by this intervening libelant, as aforesaid, and as alleged by respondent in the Answer to the libel, is null and void and of no effect.

IV.

Further replying to said answer and affirmative defense, this intervening libelant admits that he had no fishing experience and that no wages in specific sum were agreed to, and all other matters contained in said respondent's second affirmative defense are specifically denied.

V.

This intervening libelant denies each and every

allegation, matter and thing contained in respondent's third affirmative defense.

The reply of intervening libelant, William E. Barquist, to the affirmative defenses set forth in the answer of the respondent, Tobin, on file in this cause, alleges:

I.

Admits that said intervening libelant signed a purported working share and contract prepared by the respondent at Seattle, Washington on May 4, 1954 and denies all other allegations in said respondent's first affirmative defense.

II.

This intervening libelant had no previous experience on a commercial fishing vessel nor knowledge about such vessel. Respondent represented to this intervening libelant that he was the owner of an 80 foot tuna clipper fishing vessel called the "Silver Spray" and that said vessel was equipped for tuna clipper fishing for tuna, or would be so equipped on its arrival in California, and that the said vessel was to leave for San Diego, California on May 15, 1954 to arrive not later than June 1, 1954 to fulfill contract with Van Camp Sea Food Co., Inc. to fish for tuna out of San Diego, California for the 1954 season.

III.

That the aforesaid representations by the respondent were false and were made with the intent

to deceive this intervening libelant so that said writing prepared by the respondent and executed by this intervening libelant, as alleged by the respondent in answer to the libel, is null and void and of no effect.

IV.

Further replying to said answer and affirmative defense, this intervening libelant admits that he had no fishing experience and that no wages in specific sum were agreed to, but that otherwise this intervening libelant has no knowledge or information sufficient to form a belief as to the truth of the matters alleged in paragraph III or the second affirmative defense, and therefore denies the same.

V.

This intervening libelant denies the allegations of the third affirmative defense.

Wherefore, the intervening libelants herein pray that the affirmative defenses alleged by the respondent be denied and that they have a decree as prayed for by their libel.

/s/ LEWIS S. ARMSTRONG,
Proctor for Intervening Libelants Edgar L. Peecher and William E. Barquist.

Duly Verified.

Acknowledgment of Service attached.

[Endorsed]: Filed September 14, 1954.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Cause having come on regularly for trial on the 14th day of September, 1954, and the said trial having been continued from day to day and concluded on the 17th day of September, 1954, all of the parties being represented by their proctors of record, and the Court having duly considered the testimony of the witnesses and the exhibits admitted in evidence, and having duly considered the briefs and arguments of counsel, and being fully advised in the premises, does now make the following

Findings of Fact.

I.

That on or about April 28, 1954, the respondent Robert F. Tobin purchased the respondent oil screw vessel Silver Spray, Official Number 250,538, her engines, tackle, apparel, furniture and equipment. At all times material since that date, said respondent has been and still is the owner and operator of said vessel.

II.

That the said respondent oil screw vessel Silver Spray was duly and regularly attached by the United States Marshal pursuant to the process of this Court, in this cause, on June 10, 1954, in waters within the Port of Seattle, Washington, within this District and within the jurisdiction of this Court.

That the said respondent, Robert F. Tobin, duly appeared in this cause and made claim to said vessel, as it owner, on July 26, 1954.

III.

That on or about April 17, 1954, the said respondent, Robert F. Tobin, entered into a contract of employment with the libelant, Harry C. Lower, the said libelant agreeing to work aboard the said vessel equipped as a fresh bait and refrigerated tuna clipper operating from southern California during the 1954 tuna fishing season, in return for one-tenth of the season's catch.

IV.

That on or about April 21, 1954, the said Harry C. Lower commenced working on board said vessel at the Port of Seattle, Washington, and thereafter continued to serve on board said vessel as a member of its crew until discharged as hereinafter related.

V.

That on or about April 22, the said respondent, Robert F. Tobin, entered into a contract of employment with the intervening libelant George S. Herning, the said intervening libelant agreeing to work aboard the said vessel equipped as a fresh bait and refrigerated tuna clipper operating from southern California during the 1954 tuna fishing season, in return for one-tenth of the season's catch.

VI.

That on or about April 27, 1954, the said George

S. Herning commenced working on board said vessel at the Port of Seattle, and thereafter continued to serve on board said vessel as assistant engineer and as a member of its crew until discharged as hereinafter related.

VII.

That on or about April 30, 1954, the said respondent Robert F. Tobin entered into a contract of employment with the intervening libelant Edgar L. Peecher, the said intervening libelant agreeing to work aboard the said vessel equipped as a fresh bait and refrigerated tuna clipper operating from southern California during the 1954 tuna fishing season, in return for one-tenth of the season's catch.

VIII.

That on or about May 1, 1954, the said Edgar L. Peecher commenced working on board said vessel at the Port of Seattle, and thereafter continued to serve on board said vessel as a member of its crew until relieved by the said respondent of his duties at the Port of Ketchikan, Alaska, on or about May 24, 1954. That the said Edgar L. Peecher thereafter reported for work aboard said vessel on or about June 4, 1954, and remained aboard said vessel as a member of its crew until discharged as hereinafter related.

IX.

That on or about May 11, 1954, the said respondent Robert F. Tobin entered into a contract of employment with the intervening libelant William E. Barquist, the said intervening libelant agreeing

to work aboard the said vessel equipped as a fresh bait and refrigerated tuna clipper operating from southern California during the 1954 tuna fishing season, in return for one-tenth of the season's catch.

X.

That on or about the same date the said William E. Barquist commenced working on board said vessel at the Port of Seattle, and thereafter continued to serve on board said vessel as a member of its crew until discharged as hereinafter related.

XI.

That on or about June 2, 1954, the said respondent Robert F. Tobin entered into a contract of employment with the intervening libelant Norman L. Bunker, the said intervening libelant agreeing to work aboard the said vessel equipped as a fresh bait and refrigerated tuna clipper operating from southern California during the 1954 tuna fishing season, in return for one-tenth of the season's catch.

XII.

That on June 3, 1954, the said Norman L. Bunker reported on board said vessel for work at the Port of Seattle, and performed duties thereon in preparation for the navigation of said vessel on its intended voyage. That the said intervening libelant was then advised by respondent's agent that he would be called when needed, and that the said Norman L. Bunker thereafter remained in the serv-

ice of said vessel as a member of its crew until discharged as hereinafter related.

XIII.

That on or about April 28, 1954, the intervening libelant John Kadlec commenced working on board the said vessel at the Port of Seattle as a member of its crew, for an agreed wage of \$100 per week. That the said intervening libelant thereafter continued to serve on board said vessel as a member of its crew until on or about June 3, 1954.

XIV.

That the said intervening libelant John Kadlec became and is entitled to wages of \$500.00 for the services aforesaid, no part of which sum has been paid to him except \$5.00.

XV.

That on June 7, 1954, and at all times subsequent thereto and following their respective employments, the aforesaid libelant and intervening libelants, excepting John Kadlec, were ready, able and willing to continue to perform their respective contracts of employment aboard the said vessel Silver Spray, as above described. That nevertheless, the respondent Robert F. Tobin on or before said date abandoned his contracts with said persons, and abandoned the tuna fishing voyage for the 1954 tuna fishing season, as above described, and thereby wrongfully discharged said libelant and intervening libelants.

XVI.

That the abandonment of the said contract of employment and of the said voyage by the respondent Robert F. Tobin, the owner and operator of said vessel, was through no fault of the said libelant or intervening libelants.

XVII.

That on June 7, 1954, the libelant Lower and the said intervening libelants Herning, Peecher, Barquist and Bunker became entitled to and then had valid causes of action against the said oil screw vessel Silver Spray, her engines, tackle, apparel, furniture and equipment, and against the respondent Robert F. Tobin, for damages to the extent of the value of the share of each of said libelant crew members in and to the prospective tuna fish catch of the said vessel Silver Spray, as a tuna clipper equipped for fresh bait and refrigeration, for the 1954 season.

XVIII.

That the said causes of action above mentioned are the causes of action sued upon in this proceeding.

XIX.

That the said libelant and intervening libelant crew members may also have had causes of action against the respondent Robert F. Tobin at common law for fraud and deceit, or on some other cause of action at law. That they were nevertheless not required to sue the said respondent on any such theory, and did not do so in this proceeding.

XX.

That the value of each of said shares referred to in finding number XV was and is the sum of \$7,500.00, for which amount each of said libelant and intervening libelants Harry C. Lower, George S. Herning, Edgar L. Peecher, William E. Barquist and Norman L. Bunker has a maritime lien against the said oil screw vessel *Silver Spray*, her engines, tackle, apparel, furniture and equipment, and a right of action in personam against the respondent, Robert F. Tobin.

XXI.

That the nature and rank of the liens of the said libelant and intervening libelant crew members were and are for seaman's wages, and that the same are superior and prior to the maritime lien of the preferred ship mortgage lien hereinafter referred to.

XXII.

That from said shares above mentioned should be deducted the respective earnings of the said libelant and intervening libelants to the date of trial, and their prospective earnings to the end of the tuna fishing season, to-wit, on or about October 15, 1954. That there should be deducted from the share of the libelant, Harry C. Lower, the sum of \$875.00.

That there should be deducted from the share of the intervening libelant George S. Herning the sum of \$450.00.

That there should be deducted from the share of

the intervening libelant Edgar L. Peecher the sum of \$100.00.

That there should be deducted from the share of the intervening libelant William E. Barquist the sum of \$998.00.

That there should be deducted from the share of the intervening libelant Norman L. Bunker the sum of \$180.00.

XXIII.

That on April 28, 1954, the said respondent, Robert F. Tobin, executed and delivered to Fred I. Putnam and James A. Overman, additional intervening libelants, his promissory note in the sum of \$30,000.00, which sum he promised to pay in two installments each year in the amounts of \$2,500.00 each, including interest at the rate of five (5%) per cent per annum. Said promissory note provided that the first of said installments should be paid on September 1, 1954, and that if the same were not paid the whole sum of principal and interest should become immediately due and collectible at the option of the holder thereof. Said promissory note further provided that in case suit or action be instituted to collect the same, or any portion thereof, the respondent should pay such additional sum as the Court might adjudge reasonable as attorney's fees in said suit or action.

XXIV.

That to secure the payment of the principal and interest of said promissory note above referred to, the said respondent executed and delivered to the

said additional intervening libelants, as mortgagees, a preferred ship mortgage dated April 28, 1954, by the terms of which the said respondent mortgaged to the said additional intervening libelants the whole of the said oil screw vessel *Silver Spray*, her engines, tackle, apparel, furniture and equipment, said mortgage providing that if respondent should fail to perform the covenants and promises in said promissory note and in said mortgage, then the said mortgage should be in default.

XXV.

That the said preferred ship mortgage was thereafter duly filed for record in the office of the Collector of Customs at the Port of Seattle, Washington, and was duly recorded by him, on April 28, 1954, in accordance with the provisions of Section 30, Subsection "C" of the Ship Mortgage Act of June 5, 1920. That the said mortgage was endorsed upon the document of the said vessel in accordance with the provisions of said Act, and that all of the acts required to be done by said Act in order to give to the said mortgage status of a preferred ship mortgage were duly done or caused to be done, either by mortgagees or by the said Collector of Customs.

XXVI.

That the said respondent has failed to pay the first installment due under the terms of the aforesaid promissory note, and is in default, and that there is now due and owing to the said additional intervening libelants, Fred I. Putnam and James

A. Overman, the principal sum of \$30,000.00, together with interest thereon in the sum of \$750.00, and the said additional intervening libelant's costs and disbursements herein to be taxed.

XXVII.

That in addition thereto the said additional intervening libelants are entitled to recover a reasonable attorney's fee, as provided for by the terms of the aforesaid promissory note, which the Court finds to be and fixes in the amount of \$2,500.00.

XXVIII.

That the said additional intervening libelants have a preferred ship mortgage lien against the respondent vessel for the sums aforesaid, and that said lien is secondary to the liens of the libelant and intervening libelant crew members.

XXIX.

That the rights of action and the rights of libelant and the intervening libelant crew members to have the respondent oil screw vessel Silver Spray, her engines, tackle, apparel, furniture and equipment, attached by the process of this Court arose not less than three days before said vessel was attached at the instance of the libelant. That the claim of the respondent Robert F. Tobin against libelant and against the said intervening libelants for damages in the nature of demurrage or detention, for wrongful attachment of said vessel, is not valid and should be denied.

Done in Open Court this 28th day of October, 1954.

/s/ JOHN C. BOWEN,

United States District Judge.

Based upon the foregoing findings of fact the Court now makes the following

Conclusions of Law

I.

That this proceeding is within the admiralty and maritime jurisdiction of the United States and within the jurisdiction of this Court sitting in admiralty.

II.

That the libelant, Harry C. Lower, is entitled to a decree herein against the respondent oil screw vessel Silver Spray, her engines, tackle, apparel, furniture and equipment, and against the respondent Robert F. Tobin, in the sum of \$6,625.00, together with his costs and disbursements herein to be taxed.

III.

That the intervening libelant George S. Herning is entitled to a decree herein against the said respondent vessel, and against the said respondent Robert F. Tobin, in the sum of \$7,050.00, together with his costs and disbursements herein to be taxed.

IV.

That the intervening libelant Edgar L. Peecher is entitled to a decree herein against the said re-

spondent vessel, and against the said respondent Robert F. Tobin, in the sum of \$7,400.00, together with his costs and disbursements herein to be taxed.

V.

That the intervening libelant William E. Barquist is entitled to a decree herein against the said respondent vessel, and against the said respondent Robert F. Tobin, in the sum of \$6,502.00 together with his costs and disbursements herein to be taxed.

VI.

That the intervening libelant Norman L. Bunker is entitled to a decree herein against the said respondent vessel, and against the said respondent Robert F. Tobin, in the sum of \$7,320.00, together with his costs and disbursements herein to be taxed.

VII.

That the intervening libelant John Kadlec is entitled to a decree herein against the said respondent vessel, and against the said respondent Robert F. Tobin, in the sum of \$495.00, together with his costs and disbursements herein to be taxed.

VIII.

That the aforesaid libelant and intervening libelant crew members are entitled to have the said vessel, her engines, tackle, apparel, furniture and equipment, condemned and sold, and the proceeds of sale applied first to the payment of the said liens.

IX.

That the aforesaid maritime liens of the libelant Harry C. Lower and the intervening libelants George S. Herning, Edgar L. Peecher, William E. Barquist, Norman L. Bunker and John Kadlec against said vessel are superior in rank and prior to the maritime lien of the preferred ship mortgage of the additional intervening libelants, Fred I. Putnam and James A. Overman.

X.

That the additional intervening libelants, Fred I. Putnam and James A. Overman, mortgagees, are entitled to a decree herein against the respondent oil screw vessel Silver Spray, her engines, tackle, apparel, furniture and equipment, in the sum of \$30,725.00, together with a reasonable attorney's fee in the sum of \$2,500.00, and their costs and disbursements herein to be taxed.

XI.

That the said lien of the additional intervening libelants, Fred I. Putnam and James A. Overman, against said vessel, is superior in rank and prior in time to any and all maritime liens against the said vessel saving those foreclosed by the above mentioned libelant Harry C. Lower and intervening libelants George S. Herning, Edgar L. Peecher, William E. Barquist, Norman L. Bunker and John Kadlec.

XII.

That the said additional intervening libelant

mortgagees are entitled to have the said vessel condemned and sold, and the proceeds of sale applied to the amount of their said claim, together with their attorney's fee and costs allowed herein, subject, however, to the full payment of the prior maritime liens in the amounts herein found due of the libelant and intervening libelant crew members, together with their costs and disbursements.

XIII.

That any deficiency remaining unpaid after applying the proceeds of sale of said respondent vessel to payment of the aforesaid claims in the order of rank above provided, the aforesaid libelant and intervening libelants and additional intervening libelants are entitled to recover of the respondent Robert F. Tobin, together with interest thereon from the date of the decree.

Done in Open Court this 28th day of October, 1954.

/s/ JOHN C. BOWEN,

United States District Judge.

Approved as to form and presented by:

/s/ M. BAYARD CRUTCHER,

Of Bogle, Bogle & Gates, Proctors for
Libelant.

/s/ LEWIS S. ARMSTRONG,

Proctor for Intervening Libelants Wil-
liam E. Barquist and Edgar L.
Peecher.

/s/ ROBERT B. ALLISON,
Proctor for Intervening Libelant
George S. Herning.

/s/ ROBERT C. WELLS,
Proctor for Intervening Libelant
Norman L. Bunker.

Acknowledgment of Service attached.

[Endorsed]: Lodged October 26, 1954.

[Endorsed]: Filed October 28, 1954.

In the United States District Court for the West-
ern District of Washington, Northern Division

In Admiralty—No. 16039

HARRY C. LOWER, Libelant,
vs.

THE Oil Screw Vessel SILVER SPRAY, etc.,
et al., Respondents,
JOHN KADLEC, et al., Intervening Libelants,
FRED I. PUTNAM and JAMES A. OVERMAN,
Additional Intervening Libelants.

DECREE

The above entitled cause having regularly come on for trial in the above entitled Court, before the undersigned Judge thereof, on September 14, 1954, said trial having thereafter been regularly continued from day to day and concluded on September 17, 1954, the libelant, Harry C. Lower, and the

intervening libelant John Kadlec being present in Court and represented by M. Bayard Crutcher, their proctor, and the intervening libelant George S. Herning being present in Court and represented by his proctor, Robert B. Allison, and the intervening libelants Edgar L. Peecher and William E. Barquist being present in Court and represented by their proctor, Lewis S. Armstrong, and the intervening libelant Norman L. Bunker being present in Court and represented by his proctor, Robert C. Wells, and the respondent and claimant to the respondent oil screw vessel Silver Spray, her engines, tackle, apparel, furniture, and equipment, Robert J. Tobin, being present in Court and represented by Leonard Collins, his proctor, and the additional intervening libelants Fred I. Putnam and James A. Overman being present in Court and represented by their proctor, Stephen V. Carey, and this Court having duly considered the evidence and exhibits submitted by the respective parties, and the briefs and arguments of counsel, and being fully advised in the premises, and having orally announced its decision herein and having entered its findings of fact and conclusions of law herein.

Now, Therefore, in accordance therewith, it is

Ordered, Adjudged and Decreed that the libelant, Harry C. Lower, have and recover of the respondent vessel and of the respondent Robert J. Tobin the sum of \$6,625.00, together with his costs herein taxed in the sum of \$35.00, with interest on said total sum until paid; that the intervening libelant George S. Herning have and recover of the respond-

ent vessel and of the respondent Robert J. Tobin the sum of \$7,050.00, together with his costs herein taxed in the sum of \$30.40, with interest on said total sum until paid; that the intervening libelant Edgar L. Peecher have and recover of the respondent vessel and of the respondent Robert J. Tobin the sum of \$7,400.00, together with his costs herein taxed in the sum of \$20.00, with interest on the said total sum until paid; that the intervening libelant William E. Barquist have and recover of the respondent vessel and of the respondent Robert J. Tobin the sum of \$6,502.00, together with his costs herein taxed in the sum of \$0.00, with interest on the said total sum until paid; that the intervening libelant Norman L. Bunker have and recover of the respondent vessel and of the respondent Robert J. Tobin the sum of \$7,320.00, together with his costs herein taxed in the sum of \$20.00, with interest on the said total sum until paid; that the intervening libelant John Kadlec have and recover of the respondent vessel and of the respondent Robert J. Tobin the sum of \$495.00 together with his costs herein taxed in the sum of \$0.00, with interest on the said total sum until paid; and that the liens of the aforesaid libelant and intervening libelants are equal and superior in rank to that of the preferred ship mortgage foreclosed herein; and it is

Further Ordered Adjudged and Decreed that the preferred ship mortgage upon the respondent vessel be and the same is hereby foreclosed, and that the mortgagees, the additional intervening libelants Fred I. Putnam and James A. Overman, have and

recover of the respondent vessel and of the respondent Robert J. Tobin the sum of \$33,225.00, together with their costs herein taxed in the sum of \$28.20, with interest on said total sum (excepting the amount of \$725.00) until paid; and that the lien of the aforesaid additional intervening libelants Putnam and Overman is superior and prior to any other maritime liens whatsoever against said vessel, save those for costs and for the awards to the libellant and intervening libelants above provided for; and said vessel "Silver Spray", her engines, tackle, apparel, furniture and equipment are hereby condemned and ordered sold by the Marshal to the highest and best bidder for cash and that the proceeds of such sale be applied to the payment of the foregoing awards to said libelants and intervening libelants and said Putnam and Overman and to said costs and accruing costs; and it is

Further Ordered, Adjudged and Decreed that any other persons having or claiming any interest whatsoever in said vessel be and the same are hereby foreclosed and forever barred from asserting the same; and it is

Further Ordered, Adjudged and Decreed that the Clerk of this Court issue a writ of venditioni exponas to Marshal of this District, for the sale of said vessel on board thereof, returnable on the 15th day of November, 1954, the Marshal giving six (6) days notice of sale pursuant to law, and it is

Further Ordered, Adjudged and Decreed that out of the proceeds of the sale of the said oil screw vessel Silver Spray, when paid into the registry

of the Court, the Clerk of this Court take such lawful fees and costs, including moorage and insurance premiums in lieu of ship's keepers and such other costs as may be due to him and to the United States Marshal, and then pay to the libelant Harry C. Lower, or his proctor, and to the intervening libelants George S. Herning, Edgar L. Peecher, William E. Barquist, Norman L. Bunker and John Kadlec, or their proctors, the respective amounts herein adjudged due to each of them, prorata, and it is further

Ordered, Adjudged and Decreed that if any part of the proceeds of sale of said vessel then remains in the registry of the Court, that the same be paid by the Clerk to the additional intervening libelants Fred I. Putnam and James A. Overman, or their proctor, in the amount herein adjudged due to them; and it is

Further Ordered, Adjudged and Decreed that if there be any residue in the registry of the Court after the payment of the proceeds as above directed, the same be paid to the respondent Robert J. Tobin, or his proctor, and it is

Further Ordered, Adjudged and Decreed that for any deficiency of the proceeds of the sale of said vessel to satisfy the amounts adjudged due to the libelant and respective intervening libelants and additional intervening libelants as aforesaid, the said libelant and respective intervening libelants and additional intervening libelants shall have execution against the respondent and his stipulators for costs,

their goods, chattels and lands, forthwith to satisfy this decree.

Done in Open Court this 28th day of October, 1954.

/s/ JOHN C. BOWEN,
United States District Judge

Approved and presented by:

/s/ BAYARD CRUTCHER,
Of Proctors for Libelant Harry C. Lower
and Intervening Libelant John Kadlee

/s/ LEWIS S. ARMSTRONG,
Proctor for Intervening Libelants Edgar
L. Peecher and William E. Barquist.

/s/ ROBERT B. ALLISON,
Proctor for George S. Herning.

/s/ ROBERT C. WELLS,
Proctor for Intervening Libelant Norman
L. Bunker.

Acknowledgment of Service attached.

[Endorsed]: Lodged October 26, 1954.

[Endorsed]: Filed October 28, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: Libelant, Harry C. Lower and Intervening Libelant, John Kadlec and Bogle, Bogle & Gates, their proctors; Intervening Libelants, George S. Herning, Edgar L. Peecher, William E. Barquist and Robert B. Allison and Lewis S. Armstrong, their proctors; Intervening Libelant, Norman L. Bunker and Robert C. Wells, his proctor; and

To: The Clerk of the Above Entitled Court:

You, and each of you, will please take notice that Fred I. Putnam and James A. Overman, Additional Intervening Libelants, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the Decree in favor of libelant and intervening libelants above named entered in the above cause on the 28th day of October, 1954, for the reasons specified in their Assignments of Error filed herein, true copies of which are herewith served upon your proctors of record.

Dated this 26th day of November, 1954.

/s/ FRED I. PUTNAM

/s/ JAMES A. OVERMAN

Acknowledgment of Service attached.

[Endorsed]: Filed November 29, 1954.

[Title of District Court and Cause.]

ASSIGNMENTS OF ERROR

The appellants Fred I. Putnam and James A. Overman, hereby assign error in the proceedings, decrees, orders and decisions of the District Court in the above entitled cause as follows:

1. The court erred in failing to find and decree that the preferred marine mortgage of appellants Putnam and Overman is a first, prior, and superior lien against the vessel Silver Spray, or its proceeds.

2. The court erred in finding and decreeing that libelant Lower and intervening Libelants Herning, Peecher, Barquist and Bunker, or either of them, have any lien whatsoever against the vessel, or any cause of action either in personam or rem enforceable in admiralty.

3. The court erred in finding and decreeing that said libelant and said intervening libelants proved any damages, and this error is assigned regardless of whether the libels were or were not properly instituted and prosecuted within the admiralty jurisdiction of the District Court.

4. The court erred in finding that said libelant and said intervening libelants were employees rather than fishermen expecting to operate fishing lay.

5. The court erred in finding that said libelant and said intervening libelants were ready, able and willing to continue to perform their fishing con-

tracts, and that they or either of them were wrongfully discharged by abandonment.

6. The court erred in finding and decreeing that on June 7, 1954 the said libelant and said intervening libelants had valid causes of action against the vessel for damages to the extent of the claimed value of the share of each of them in and to a speculative tuna fish catch.

7. The court erred in finding that the Silver Spray was constructed and equipped as a tuna clipper for fresh bait fishing and refrigeration.

8. The court erred in finding that said libelant and said intervening libelants had or have causes of action properly instituted in admiralty rather than common law actions for fraud and deceit or money had and received.

9. The court erred in finding and decreeing that said libelant and said intervening libelants are entitled to recover \$7,500.00 each or any amount whatever.

10. The court erred in failing to make specific findings on damages as required by Admiralty Rule 46 $\frac{1}{2}$.

11. The court erred in finding and decreeing that said libelant and said intervening libelants are entitled to maritime liens for seamen's wages.

12. The court erred in decreeing that said libelant and said intervening libelants have superior maritime liens for prospective fishing shares on fish that were not caught.

13. The court erred in failing to find and decree that appellants Putnam and Overman are entitled

to a decree foreclosing their preferred ship mortgage as the first and only lien against the Silver Spray, and erred in failing to condemn said vessel and to order its sale to apply the proceeds to the payment of appellants' note and preferred marine mortgage.

14. The court erred in failing to find and decree that said libelant and said intervening libelants should be charged with all costs incurred.

15. The court erred in finding and decreeing that intervening libelant John Kadlec was hired by the owner Tobin to stand watches as a seaman on the shakedown cruise to Alaska; and further erred in finding and decreeing that John Kadlec is entitled to any recovery for wages for the reason that such a finding and adjudication is against the preponderance of credible evidence.

Dated this 26th day of November, 1954.

/s/ FRED I. PUTNAM

/s/ JAMES A. OVERMAN

Approved as to Form:

/s/ ANDERSON & COLLINS

/s/ LEONARD COLLINS

Acknowledgment of Service attached.

[Endorsed]: Filed November 29, 1954.

[Title of District Court and Cause.]

ORDER CONFIRMING SALE OF VESSEL

This Matter having regularly come on for hearing this day upon the motion of libelant, and it being shown to the satisfaction of the Court that by the final decree entered herein the respondent oil screw vessel Silver Spray, her engines, tackle, apparel, furniture and equipment were condemned and ordered sold on November 15, 1954, and that pursuant to said decree a writ of venditioni exponas was duly issued out of this Court to the United States Marshal for this District, and that pursuant to said decree and writ the said Marshal did on the 15th day of November, 1954, sell the said vessel and her engines, tackle, apparel, furniture and equipment at public sale, and that the high bid therefor at said sale was the sum of \$11,000.00, the buyer being Yukon River Fishermen's Cooperative Association, Inc., a corporation, and that said price has been paid into the Registry of the Court, and that no person has objected to said sale, now on motion of libelant, it is

Ordered that the sale of the oil screw vessel Silver Spray, her engines, tackle, apparel, furniture and equipment to Yukon River Fishermen's Cooperative Association, Inc., a corporation, by the United States Marshal for this District, for the sum of \$11,000.00, be and the same is hereby confirmed.

Done in Open Court this 29th day of November,
1954.

/s/ JOHN C. BOWEN,
Judge

Presented and Approved as to Form:

/s/ M. BAYARD CRUTCHER

[Endorsed]: Filed November 29, 1954.

[Title of District Court and Cause.]

SUPERSEDEAS BOND

Whereas, the Appellants, Fred I. Putnam and James A. Overman have filed a notice of appeal to the United States Court of Appeals for the Ninth Circuit to reverse, modify and the decree entered by the District Court of the United States for the Western District of Washington, Northern Division, in the above-entitled cause on October 28, 1954, and to supersede said final decree; and

Whereas, the said Appellants are required to give an undertaking, under seal, in the sum of \$2,000.00 conditioned for the satisfaction of the use and detention of the proceeds of the sale of the Silver Spray including interest and costs, if for any reason the appeal is dismissed or if the decree is affirmed, and to satisfy in full such costs, interest and damages as the Appellate Court may adjudge and award.

Now, Therefore, in consideration of the premises and of such appeal, the undersigned, United Pacific

Insurance Company, a corporation organized and existing under the laws of the State of Washington, and duly licensed to transact a general surety business in the State of Washington, does hereby undertake and promise on the part of the Appellants that said Appellants will comply with the conditions as above set forth, and does further agree that upon default by the said Appellants in any of the conditions hereof, the damages and costs, not exceeding the sum aforesaid, may be ascertained in such manner as this Court shall direct; that this Court may give judgment hereon in favor of any person thereby aggrieved against it for the damages and costs suffered or sustained by such aggrieved party, and that said judgment may be rendered in the above-entitled cause or proceeding against it.

/s/ FRED I. PUTNAM

/s/ JAMES A. OVERMAN

[Seal] UNITED PACIFIC INSURANCE
COMPANY,

/s/ By J. A. HODSON,
Attorney-in-Fact

Approved this 29th day of November, 1954.

/s/ JOHN C. BOWEN,
Judge.

Approved as to form:

ANDERSON & COLLINS
By LEONARD COLLINS
Proctors for Tobin.

Acknowledgment of Service attached.

[Endorsed]: Filed November 29, 1954.

[Title of District Court and Cause.]

STATEMENT OF POINTS RELIED UPON BY
APPELLANTS PUTNAM AND OVERMAN

To the Clerk of the above entitled Court, and to
Bogle, Bogle & Gates, proctors for Libelant
Harry C. Lower and Intervening Libelant John
Kadlec; Robert B. Allison and Lewis S. Arm-
strong, proctors for Intervening Libelants
Herning, Peecher, and Barquist; Robert C.
Wells, proctor for Intervening Libelant Bunk-
er; Anderson & Collins, proctors for Respond-
ent Robert J. Tobin:

Please Take Notice that appellants Putnam and
Overman hereby adopt their fifteen assignments of
error dated November 26, 1954 as their statement
of points on which they intend to rely on this
appeal.

Dated at Seattle, Washington, this 14th day of
January, 1955.

PEYSER, CARTANO, BOTZER &
CHAPMAN,

/s/ By ARTHUR H. BOTZER,

Proctors for Putnam and Overman

Acknowledgment of Service attached.

[Endorsed]: Filed January 18, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO APOSTLES
ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington do hereby certify that pursuant to the provisions of Rule 75(o) of the Federal Rules of Civil Procedure, and Subdivision 1 of Rule 10 of the United States Court of Appeals for the Ninth Circuit, and stipulation of counsel, I am transmitting herewith as the record on appeal from the Decree filed Oct. 28, 1954 to the United States Court of Appeals at San Francisco, the following original papers:

1. Libel, filed June 10, 1954.
45. Intervening Libel in Rem and in Personam (Putnam and Overman), filed August 25, 1954.
52. Answer and Affirmative Defenses of Respondent Tobin to Libel and Intervening Libels of Lower, Bunker, Herning, Peecher and Barquist, filed Sept. 2, 1954, together with exhibit attached.
57. Reply of Libelant Lower, filed Sept. 8, 1954.
77. Findings of Fact and Conclusions of Law, filed Oct. 28, 1954.
78. Decree, filed Oct. 28, 1954.
89. Notice of Appeal, filed Nov. 29, 1954.
90. Assignments of Error, filed Nov. 29, 1954.

93. Supersedeas Bond (\$2,000.00), (UP I Co), filed Nov. 29, 1954.

99. Statement of Points Relied upon by Appellants Putnam and Overman, filed Jan. 18, 1955.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the appellants for preparation of the record on appeal in this cause, to-wit: Filing fee, Notice of Appeal, \$5.00; and that said amount has been paid to me on behalf of the appellants.

Witness my hand and official seal this 4th day of February, 1955, at Seattle, Washington.

[Seal] MILLARD P. THOMAS,
 Clerk
 /s/ By TRUMAN EGGER,
 Chief Deputy

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO SUPPLEMENTAL APOSTLES ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Rule 75(o) of the Federal Rules of Civil Procedure, and Subdivision 1 of Rule 10 of the United States Court of Appeals for the Ninth Cir-

enit, and Designation of counsel, I am transmitting herewith as supplemental apostles on appeal in the above-entitled cause, the following original papers in the file of the cause, to-wit:

5. Monition and Attachment with Marshal's Return thereon, filed June 15, 1954.

15. Intervening Libel of John Kadlec, Doss R. Payne and Norman L. Bunker, filed July 26, 1954.

33. Intervening Libel of William E. Barquist and Edgar L. Peecher, filed Aug. 16, 1954.

35. Intervening Libel of George S. Herning, filed Aug. 16, 1954.

37. Order Authorizing Withdrawal of Proctor Robert C. Wells for John Kadlec, filed Aug. 16, 1954.

47. Monition and Attachment on Intervening Libel of Fred I. Putnam and James A. Overman, filed Aug. 30, 1954 with Marshal's Return thereon.

63. Reply of Intervening Libelant Norman Bunker, filed 9-10-54.

66. Reply of Intervening Libelant George S. Herning, filed 9-13-54.

67. Reply of Intervening Libelants Edgar L. Peecher and William E. Barquist, filed Sept. 14, 1954.

95. Order Confirming Sale of Vessel, filed Nov. 29, 1954.

100. Designation by Appellants of Additional Original Documents for Certification to U.S.C.A., filed March 28, 1955.

Witness my hand and official seal this 8th day of April, 1954, at Seattle, Washington.

[Seal] MILLARD P. THOMAS,
 Clerk
 /s/ By TRUMAN EGGER,
 Chief Deputy

In the United States District Court for the Western District of Washington, Northern Division
No. 16039

[Title of Cause.]

TRANSCRIPT OF PROCEEDINGS AT TRIAL
Seattle, Wash., Sept. 14, 1954, 2:00 o'clock, p.m.

Before: The Honorable John C. Bowen, District Judge. [1*]

Appearances:

M. Bayard Crutcher, of Bogle, Bogle & Gates, 603 Central Bldg., Seattle, Wash., appearing for and on behalf of libelant Harry C. Lower and intervening libelant John Kadlec.

Leonard Collins, of Anderson & Collins, 1114 Vance Bldg., Seattle, Wash., appearing for and on behalf of respondents The Oil Screw Silver Spray, her engines, etc., and Robert J. Tobin, and claimant Robert J. Tobin.

Robert C. Wells, 2703 Smith Tower, Seattle,

* Page numbers appearing at foot of page of original Reporter's Transcript of Record.

Wash., appearing for and on behalf of intervening libelant Norman L Bunker.

Lewis S. Armstrong, 760 Central Bldg., Seattle, Wash., appearing for and on behalf of intervening libelants William E. Barquist and Edgar L. Peecher.

Robert B. Allison, 400 Central Bldg., Seattle, Wash., appearing for and on behalf of intervening libelant George S. Herning.

Stephen V. Carey, 811 New World Life Bldg., [2] Seattle, Wash, appearing for and on behalf of additional intervening libelants Fred I. Putnam and James A. Overman.

(The above-entitled case is called for trial by the Court.)

(Upon oral motion of Mr. Wells, the libel of Doss R. Payne is dismissed by the Court.)

* * * * *

The Court: You may now call your first witness or otherwise proceed with your case [3] in chief.

Mr. Crutcher: Mr. Lower.

HARRY C. LOWER

called as a witness by and in his own behalf, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Crutcher): Will you please state your full name?

A. Harry Charles Lower.

Q. Where do you live?

A. Hermiston, Oregon, 835 Orchard Street.

(Testimony of Harry C. Lower.)

Q. Are you the libelant in this action?

A. Yes.

Q. How old are you?

A. Thirty-two years old.

Q. Married? A. Yes. [4]

* * * * *

Q. How long were you in the Navy?

A. Four and one-half years.

Q. Were you at sea any of that time?

A. About three and a half years at sea. [5]

* * * * *

Q. Now, when did you first hear of Mr. Tobin, the respondent in this action?

A. Along the first of April—about April 11th I believe.

* * * * *

A. (Continued) I read in the "Portland Oregonian" an ad, advertising—

Q. Well, as a result of that ad, did you get in touch with Mr. Tobin?

A. Yes. Mr. Tobin got in touch with me. He [6] called me April 17th.

* * * * *

Q. And where did you meet Mr. Tobin?

A. In his home.

Q. Now, at that time did Mr. Tobin say anything to you relating to a vessel called the Silver Spray?

A. Yes. He pulled out a picture—

Q. That is sufficient. What did he say to you with respect to that vessel as concerns ownership?

(Testimony of Harry C. Lower.)

A. He said: "This is my boat. I own the Silver Spray." [7]

* * * * *

Q. Did he say what type of a vessel?

A. Said it was a tuna clipper.

Q. And did he say anything to you as to the equipment aboard that vessel?

A. He said it was fully equipped except for bait tanks; that he had the poles; and there was a lot of gear over in the gear locker.

Q. Did he say anything to you with respect to the capacity of the vessel?

A. He said it was a 49 ton net hold, 70 ton gross, I believe it was.

Q. Did he say anything to you with reference to intended use of that vessel?

A. He said that he had a contract with Van Kamp's cannery in San Diego, California; that he was going to take the vessel down there for tuna fishing.

Q. Did he say what time he intended to depart?

A. Said he planned to depart about May 15th.

Q. Incidentally, at this time where was the vessel Silver Spray?

A. He said it was in the Port of Seattle.

Q. Did he offer you a position on that vessel?

A. He offered me a working share in the vessel.

Q. And did he say anything to you with reference to the officers and other crew members of the vessel, whether they had already been employed?

A. He said he had one share left. He had just

(Testimony of Harry C. Lower.)

that morning sold a share to a cook in a marine hospital, and he had one share left.

* * * * *

Q. Now, at that time, did he show you any literature from Van Kamp?

A. Not at that time, no.

Clerk: This will be Libelant's Exhibit [9] No. 1.

(Booklet marked Libelant's Exhibit No. 1 for identification.)

Q. (By Mr. Crutcher): Showing you a booklet which has been marked for identification as Libelant's Exhibit 1, Mr. Lower, do you recognize that booklet?

A. Yes. That is the booklet I received when I went aboard the vessel.

Q. When did Mr. Tobin give that to you?

A. Oh, a couple of days after I went aboard the Silver Spray.

Q. As a result of the conversation which you had in Spokane, did you agree to go aboard the Silver Spray? [10]

* * * * *

A. Yes, I went aboard about the 21st or 22nd.

Q. That is of April? A. April.

* * * * *

Q. Well, while you were still in Seattle what services did you perform aboard the Silver Spray?

A. Any work that was designated by the skipper, Mr. Tobin. I painted, cleaned up, helped the engineer, helped down in the engine room, general deck work.

(Testimony of Harry C. Lower.)

Q. Where were you living during that time?

A. Aboard the boat.

Q. Now, thereafter, did you sail aboard the Silver Spray? [11]

* * * * *

A. May 18th.

Q. And the vessel departed for where?

A. Ketchikan, Alaska.

Q. And while the vessel was sailing from here to Ketchikan, did you perform any services on board?

A. Yes. I stood helmsman's watch, and I stood watch with Mr. Gehrig learning navigation.

Q. Did you stand a regular watch?

A. Yes.

Q. Now, about when did the vessel arrive in Ketchikan?

A. May 21st, close to there.

* * * * *

Q. When you arrived at Ketchikan, what occurred?

A. We stayed there that day. Mr. Tobin along about five o'clock in the evening said that he received a call to go to Wrangell after a load of shrimp, and he wanted the boat to proceed to Wrangell to pick up a load of shrimp. [12]

Q. All right. Did you proceed with the vessel?

A. Yes.

Q. Did Mr. Tobin remain with the vessel?

A. No. He stayed in Ketchikan.

* * * * *

(Testimony of Harry C. Lower.)

Q. And how many crew members were there?

The Court: Read the question.

(Last question is read by the reporter.)

A. I think 11 or 12. I forget which. Well, there were 11 or 12 altogether. Crew members—there was——

Q. You could name them if it would be easier.

A. Herning——

Q. What duties was he performing?

A. Stan Herning was working in the engine room, assistant engineer. There was Helge—I don't know his last name, a Norwegian engineer.

The Court: Was he an engineer? [13]

Witness: Yes, licensed engineer.

Q. (By Mr. Crutcher): Would that be George Helwig? A. I believe that is it.

Peecher—he stood helmsman's watch. Bert Fontague, which was the cook.

* * * * *

A. (Continued) Bill Barquist.

Q. What did he do?

A. He stood helmsman's watch.

Don Moore. He was the navigator, skipper, to take us up there.

Q. And was Mr. Kadlec on board?

A. Yes, John Kadlec.

Q. What services did he perform, if you know?

A. He stood helmsman's watch.

Q. Was he in the engine room?

A. He worked in the engine room part of the time. [14]

(Testimony of Harry C. Lower.)

Q. Now, on the way up, did Mr. Tobin perform any services?

A. He stood watch with Don Moore, Mr. Moore.

Q. And was Mr. Payne on board?

A. Doss Payne? Yes.

Q. And what did Mr. Payne do?

A. He stood a watch, helmsman's watch.

Q. Where there any other people on board?

A. Mr. Jim Gehrig.

* * * * *

Q. You say he was navigator——

A. He was navigator on the off watch.

Q. Was there anybody else on board?

A. Dr. Trowbridge. [15]

* * * * *

Q. Now, at Ketchikan how many of these men got off?

A. Doss Payne, Dr. Trowbridge, Mr. Tobin, Mr. Gehrig.

* * * * *

Q. Now, you went on to Wrangell you said, and then what happened then? Where did you go from there?

A. We proceeded back to Ketchikan.

Q. And did you thereafter see Mr. Tobin?

A. When we got to Ketchikan I saw Mr. Tobin. I went up to the Stebbin Hotel Coffee Shop with him. [16]

* * * * *

Q. It would be May 24th then I believe, is that right?

A. May 24th.

(Testimony of Harry C. Lower.)

Q. Did you have a discussion with Mr. Tobin at that time? A. Yes. [17]

* * * * *

Q. Did Mr. Tobin at that time give you any instructions as to what was to be done with the vessel?

A. He said take the booms off, the jig booms, the booms for tuna; take them off of the boat.

Q. And did he state anything to you with reference to the use which was to be made of the vessel?

A. He said that it was going to be used here in Alaska for hauling cargo.

Q. At that time did he say anything to you with reference to tuna fishing? A. No.

Q. Did he say anything to you at that time about a hunting lodge?

A. Yes. He said they had a site picked out for a hunting lodge there in Alaska.

Q. Did he say anything about how the vessel would be used in connection with that?

A. To haul clients up there to the hunting lodge and supply the hunting lodge. [18]

* * * * *

Q. Now, do you know whether Mr. Tobin thereafter left the City of Ketchikan? A. Yes.

Q. When did he leave?

A. That same day.

Q. Did you have any other discussions with him before he left?

* * * * *

A. He said that he was leaving for Seattle to

(Testimony of Harry C. Lower.)

get money that was deposited in the bank here for the [19] shrimp that we didn't pick up, that he had money deposited here in the bank, here in Seattle, and I also give him the receipts at that time for the money that I spent in Wrangell for repairs to the Silver Spray.

Q. And at that time did he say anything with reference to returning to Ketchikan?

A. No, he did not.

Q. At that time did he say anything about plans for tuna fishing? A. No.

Q. Now, did you again see Mr. Tobin on that day before he left for Seattle? A. No.

Q. That is, before he left Ketchikan. Did you receive any money from Mr. Tobin?

A. Approximately \$80.00.

* * * * *

Q. Did he state the purpose of that money?

A. He said it should be used for ship's money.

Q. And at that time did Capt. Moore have any ship's money? A. No. [20]

* * * * *

Q. And did Capt. Moore at that time make any remark to you as to the use of the vessel?

A. He said: "It looks like we are going to use it for cargo work around Alaska." [21]

* * * * *

Q. Was anything done about employing the vessel for cargo work?

A. Don Moore went out and tried to find some cargo to haul around there.

(Testimony of Harry C. Lower.)

Q. Was there any work found? A. No.

Q. Did you make any inquiries yourself?

A. Yes. When I left Mr. Tobin's room with Don Moore, we had no credit in Ketchikan. He says: "We need some supplies."

Q. Well, now, that will suffice. You did make inquiries? A. Yes.

Q. As a result of those inquiries, did you learn whether there was work available at Ketchikan, whether or not there was work available?

A. No, there wasn't.

Q. Did you learn the fact——

A. I learned the fact that there was no work available.

Q. All right. Now, subsequent to that week during which you lay in Ketchikan, where did the vessel go?

A. Back to the port of Seattle.

Q. And at what time on what date did you arrive [22] back in Seattle?

A. Approximately June 3rd.

* * * * *

Q. Do you recall the approximate time of the day on which you arrived back at Seattle on June 3rd?

A. Approximately 5:30 in the morning.

Q. And on that day did you again make contact with Mr. Tobin? A. Yes. [23]

Q. Where?

A. The Edmond Meany Hotel.

Q. Did you see him there? A. Yes.

(Testimony of Harry C. Lower.)

Q. Now, at that time was any one else present?

A. Don Moore.

Q. And at that time did you have any conversation relative to the ship's money which you had received?

A. No.

Q. At that time did you have any discussion about tuna fishing?

A. No.

Q. Had you met Mr. Gehrig prior to this time?

A. Yes.

Q. Had Mr. Tobin introduced Mr. Gehrig to you? [24]

* * * * *

A. Yes, he said Mr. Gehrig was his business agent.

Q. And did he say that with reference to any particular subject or transaction?

A. He will handle his business here in Seattle.

Q. Now, after talking to Tobin, did you talk with Mr. Gehrig?

A. Yes.

Q. What day was this?

A. The next day.

Q. That would be June 4?

A. June 4 of this year.

Q. And at that time when did you and where did you talk with Mr. Gehrig?

A. Aboard the Silver Spray.

Q. At that time where was Mr. Tobin, if you know?

A. I believe he was in Spokane.

Q. Did you discuss with Mr. Gehrig the use of the vessel?

A. Yes.

(Testimony of Harry C. Lower.)

Q. What was the object or subject of that conversation if you recall?

A. Mr. Gehrig said: "We are going to have to salvage something out of this. We are going to have to [25] put the vessel to work to get our money back and get some money out of it." He suggested we incorporate.

Q. Did Mr. Gehrig say anything to you about tuna fishing? A. No.

Q. After you arrived back at Seattle on June 3, was any work undertaken on the vessel to outfit it for fishing? A. No.

Q. Now, were you aboard on June 5?

A. No.

Q. Were you aboard on June 4?

A. Part of the day. I left in the evening.

Q. Who was on board still at that time?

A. There was Skipper Don Moore and the rest of the men, and the engineer, George Helwig or whatever, and the crew members came and went that day.

Q. How was the food on board so far as the supply was concerned?

A. There was very little food.

Q. On the occasion of your conversation with Mr. Gehrig was any one else present?

A. Yes.

Q. Who else?

A. Ed Peecher, and I don't know whether John [26] Kadlec was there or not; I think he might have been for part of it.

(Testimony of Harry C. Lower.)

Q. When you said that Mr. Gehrig suggested you incorporate, to whom was he referring?

A. To the shareholders. * * * * * [27]

Q. Now, did you make any subsequent efforts or did Mr. Lower make any subsequent efforts in your presence to get in touch with Mr. Tobin?

A. Yes.

Q. And on what day was that?

A. That is on June 5.

Q. That would be a Saturday, would it not?

A. Yes.

Q. And were you able to get in touch with him?

A. No.

Q. Did you make any effort to get in touch with Mr. Gehrig? A. Yes.

Q. And did you talk with Mr. Gehrig?

A. Once that day, yes, I talked to him.

Q. What was the subject of that conversation?

A. I asked him if he had got in touch with Mr. Tobin and what Mr. Tobin said about returning the money that I had invested, the working share in the vessel. [29]

Q. And what did he say?

A. He said that he had been unable to get in touch with Mr. Tobin.

Q. Did he make any statement to you with reference to the return of the money?

A. He said: 'Give me a little time.'

Q. At that time did he say anything to you about proceeding, the vessel proceeding, South to fish for tuna? A. No.

(Testimony of Harry C. Lower.)

Q. And thereafter did you consult legal counsel as to what your rights or remedies might be?

A. Yes.

Q. And who was that counsel?

A. Bogle, Bogle & Gates and Mr. Crutcher. [30]

* * * * *

Q. Subsequent to June 6th, which was that Sunday, what did you do?

A. I returned to Hermiston.

Q. When did you remove your gear from the Silver Spray? A. On the 4th. [32]

* * * * *

Q. Incidentally, and referring back in your testimony, at the time that you first discussed this matter with Mr. Tobin in Spokane on April 17th, did he make any reference with regard to the length of the tuna fishing season?

A. He said it would run into October. [33]

Q. Commencing when? When was the vessel to depart from Seattle? A. May 15th.

* * * * *

Q. Now, at that time, did Mr. Tobin make any statement to you with reference to what you might reasonably expect to earn during the season?

A. He said that I could reasonably expect over \$5,000.00. He said he was telling all his men \$5,000.00.

Mr. Crutcher: I have no other questions.

The Court: You may cross examine on behalf of any opposing litigants.

(Testimony of Harry C. Lower.)

Cross Examination

Q. (By Mr. Collins): Mr. Lower, what is your present address?

A. 835 Orchard Street, Hermiston, Oregon.

Q. You entered into an arrangement with Mr. Tobin? A. Yes.

Mr. Collins: May I please submit this document, Your Honor? [34]

The Court: Yes, you may. Do you wish it marked for identification?

Mr. Collins: Yes, Your Honor.

The Clerk: Respondent's Exhibit A-1.

(Contract marked Respondent's Exhibit A-1 for identification.)

Q. (By Mr. Collins): You have a document before you marked for identification as Respondent's A-1. Is that the contract offered to you by Mr. Tobin? A. Yes.

Q. Did you sign that agreement?

A. Yes.

Q. Did your wife sign the agreement?

A. Yes.

Q. You studied that agreement over a period of two or three days, did you not? A. No.

Q. Did you not take that agreement home to have your wife look at it and read it?

A. No. My wife was there with me.

Q. Did you understand the terms of it?

A. As well as I could, yes. [35]

Q. You understood that it was a working share in the Silver Spray?

(Testimony of Harry C. Lower.)

A. That I was a crew member in the Silver Spray, working share.

Q. And at that time you gave Mr. Tobin \$2500.00 as your share? A. Right, yes, sir.

Q. Did you and Mr. Tobin discuss this agreement? A. Yes.

Q. Then you understood that he was to manage the voyage of the vessel?

A. He was to be the skipper.

Q. And he, in the use of his discretion, could direct the vessel's movements? A. Yes.

Q. You then understood that if you cared to leave the vessel you would give Mr. Tobin 30 days' notice? A. Yes.

Q. Did you give Mr. Tobin 30 days' notice?

A. Yes.

Q. Did you give Mr. Tobin 30 days' notice?

A. No.

Q. You also understood that Mr. Tobin had the option to release you if he wanted to?

A. Yes. [36]

Q. And in either event, whether you gave notice or he should release you, you agreed under this writing to give him 90 days' notice to sell your share? A. Yes.

Q. (Continued) —and give your money back?

A. Yes.

Q. And you also understood under this agreement that you would do nothing to hinder the operation of this vessel, right? A. Yes.

(Testimony of Harry C. Lower.)

Q. You say the vessel arrived back in Seattle on June 3rd and you went to see Mr. Crutcher?

A. Not on June 3rd, no.

Q. Pardon me. You are correct. I will change the question. You say the vessel arrived in Seattle on June 3rd and thereafter you saw Mr. Crutcher, the attorney?

A. Yes.

Q. And through Mr. Crutcher you libeled this vessel?

A. Yes. [37]

* * * * *

Q. Did Mr. Tobin give you any reason to believe the contract was not in force?

A. He didn't carry out to go tuna fishing.

Q. And you didn't carry out the terms of your separation from the vessel, did you?

* * * * *

A. I tried to get in touch with Mr. Tobin and I could not. [38]

* * * * *

Q. Did you not, with other crew members, meet with Tobin and discuss the Alaska trip?

A. I was a crew member. Of course we discussed it. We were crew members. Mr. Tobin directed us to go to Alaska.

Q. Was it with your permission and with your consent?

A. It was with my consent that he said he was going to Alaska and then return and go tuna fishing.

Q. Now, what was that cruise for?

A. He represented it as more or less a shake-down cruise. The shrimp money received from the

(Testimony of Harry C. Lower.)

shrimp would pay for it. There might be certain crew members that didn't work out that he didn't want to take with him on his fishing venture to Southern waters.

Q. You had no objection to the voyage as such, did you? A. No.

Q. Now, where is the first place you stopped in Alaska?

A. Stopped at Ketchikan, Alaska. [39]

Q. And that is where you say these men left the vessel, Payne, Trowbridge, Tobin, Gehrig?

A. Yes, sir.

Q. You didn't mention Peecher, but he left, too, didn't he? A. Yes, he did.

* * * * *

Q. Why did Mr. Peecher leave?

A. He couldn't stand the cold weather. His hands were crippled up and he wanted to return to the States.

Q. Then he left the vessel of his own volition, did he not? A. Yes.

Q. Peecher is one of the libelants in this [40] case, is he not? A. Yes.

Q. Tobin received a call from Seattle to return, did you so testify? A. No.

Q. Do you know why Tobin left?

A. He said he left to come down and pick up the money that was in the bank down here on deposit. * * * * *

Q. And you all consented to it, did you not?

A. We didn't have a chance to consent.

(Testimony of Harry C. Lower.)

Q. But you knew that when Tobin left the vessel he did so on Silver Spray business?

A. That is as far as I know, yes. [41]

* * * * *

Q. Now, isn't it true, Mr. Lower, that this entire trip was, as Mr. Tobin said, merely a shake-down cruise and an experiment to try out the vessel?

A. No. I don't think it was that at all. After we got up there and there was nothing, no shrimp there, nothing there—— [42]

* * * * *

Q. The Alaska trip was a good-natured one, was it not?

The Court: So far as relationship between whom?

Mr. Collins: Between all on board.

A. No, I wouldn't say that. Mr. Peecher didn't like it a bit that we were going to Alaska.

Q. Without any reflexion on any one on board, was there quite a bit of drinking and partying?

A. Quite a bit? How much do you mean by "quite a bit"?

Q. Well, I mean as might be normal among men on a trip of that kind. [43]

* * * * *

A. No. There was no excessive drinking.

Q. I didn't ask if there was excessive drinking, but then there was friendly drinking on the trip?

A. When the men got off watch, they might have taken a drink, yes. * * * * *

(Testimony of Harry C. Lower.)

Q. You say that from the time Tobin left the vessel in Ketchikan you heard nothing more concerning his intentions to tuna fish?

A. No. Yes. I never heard any more about tuna fishing. [44]

Mr. Collins: May I submit a document?

The Court: You may have it marked if that is what you wish.

The Clerk: Respondent's Exhibit A-2.

(Copy of telegram marked Respondent's Exhibit A-2 for identification.)

The Court: Do you intend to offer in connection with this witness's interrogation Respondent's Exhibit A-1?

Mr. Collins: Thank you, Your Honor. I offer A-1 in evidence, it having been identified.

Mr. Crutcher: At the same time I will offer Libelant's 1 in evidence, which I see I omitted.

The Court: Libelant's Exhibit 1 is admitted. Respondent's Exhibit A-1 is likewise admitted.

(Libelant's Exhibit No. 1 received in evidence.)

(Respondent's Exhibit A-1 received in evidence.) [45]

Q. (By Mr. Collins): Mr. Lower, you have before you a telegram. Did you not receive that telegram or the original of it?

The Court: It has been marked Respondent's Exhibit A-2.

Q. (Continued) You received the telegram from Mr. Tobin in Seattle, did you not?

(Testimony of Harry C. Lower.)

A. I did a day after it was sent.

* * * * *

Q. What does it say, sir?

The Court: Do you wish to offer it in evidence?

Mr. Collins: Yes. I offer A-2 in evidence.

The Court: It is now admitted.

(Respondent's Exhibit No. A-2 received in evidence.) [46]

* * * * *

Q. (By Mr. Collins): Thereupon you did return to Seattle? A. Yes.

Q. And you arrived here June 3, and you and Mr. Moore saw Tobin at the Edmond Meany Hotel?

A. Right, yes, sir.

Q. And you at that time, you and Mr. Tobin, in Capt. Moore's presence, discussed tuna prospects? A. Not that I remember, no.

Q. Would you say that you did not discuss tuna prospects?

A. No, that is right; we did not.

Q. I can't hear you too well.

A. We did not discuss tuna prospects.

Q. Well, what did you discuss?

A. Oh, he said that he was flying about getting another boat, and we were going to run both boats. He [47] didn't know—he might send the Silver Spray South, and he might send the other boat up to Alaska; he didn't know.

Q. Did it make any difference to you?

A. I—at that time I was so heartsick—I knew

(Testimony of Harry C. Lower.)

there was nothing more. Anything he said I couldn't believe.

Q. Then you made no demands that the Silver Spray go tuna fishing? A. No. [48]

* * * * *

Q. A moment ago you said you were disgusted about the whole thing. What did you mean by that?

A. Because we hadn't went tuna fishing. It looks like he wanted to run to Alaska all the time.

Q. There were various different ventures under consideration, were there not?

A. At what time was this?

Q. Well, didn't you gentlemen speak of the freight to Alaska or Mr. Tobin might have two or three boats running and some of you men might be on one and some on the other, some on the Silver Spray?

A. That is what he tried to present to us, yes.

Q. Well, you and Mr. Tobin and the other shareholders were experimenting in this field, were you not? A. No, no.

Q. Have you ever tuna fished? [49]

A. No.

Q. You admit that there was no wage agreement at any time?

A. There was the promise of money coming in.

Q. That is share money on the catch of fish?

A. Yes.

Q. Now, after you and Mr. Moore left the hotel you proceeded back to the vessel?

A. No. We went over to Jim Gehrig's house.

(Testimony of Harry C. Lower.)

Q. And then you went back to the vessel after that? A. Yes.

Q. And how long did you stay aboard?

A. Practically all day I believe.

Q. Did you have a meeting at that time with the other men?

A. Most of the men were gone home.

Q. When you came down through the Sound the vessel hit a log? A. Yes.

Q. And it had to be laid up as far as you knew for several days?

A. I didn't know what the extent of the damage was.

Q. But you knew it had to be laid up for repairs? [50] A. Yes.

* * * * *

Q. Were you not told before you docked that you and the other men could go ashore for several days, go home during the time the vessel was in drydock?

Mr. Crutcher: Object, Your Honor, unless he identifies the person who is telling him this.

The Court: The objection is sustained.

Q. (By Mr. Collins): Using the same question, were you not told so by Don Moore?

A. That I could go home for several days?

Q. That all of you men could go home for several days during drydocking?

A. I never heard him tell the rest of the men that they could go home. He might have told them—not [51] in my presence.

(Testimony of Harry C. Lower.)

investment back, your investment of \$2500.00? [56]

* * * * *

A. Well, I wanted to give Mr. Tobin every opportunity in the world, and I was heartsick. I didn't know what to do. I honestly didn't know what to do, so I went and got legal counsel.

* * * * *

Q. You wanted your \$2500.00 back? Correct?

A. Yes.

Q. And isn't that the reason you saw counsel about bringing this suit? A. Yes.

Mr. Collins: That is all.

(Discussion.)

Cross Examination

* * * * * [57]

Q. (By Mr. Carey): You said that you answered or saw an ad in the paper on April 11, 1954. Where were you at that time?

A. I was in Hermiston, Oregon.

Q. And in what paper did you see it?

A. Portland Oregonian. * * * * * [59]

Q. At the time that you had these conversations in Spokane immediately following April 17th or on April 17th, they wholly concerned the proposed tuna fishing operation? A. Yes, sir.

Q. And that was the only thing that was discussed up to the time you signed the contract?

A. Yes.

Q. Nothing was said about any proposed freight-ing to and from Alaska? A. No, no.

(Testimony of Harry C. Lower.)

Q. At some time or other you put up \$2500.00?

A. The same night.

Q. That same night?

A. I signed the contract.

Q. And that was to buy in a share on a tuna fishing operation?

A. Working share on a tuna clipper.

Q. Had you ever had any tuna fishing experience of any kind? A. No, sir.

Q. Any kind of fishing experience?

A. Sport fishing is all, sir. [60]

* * * * *

Q. You departed for Alaska on May 18?

A. Yes, sir.

Q. What were you doing between April 23 and May 18? A. Working on the boat.

Q. For what purpose?

A. Getting it ready. I was painting and doing whatever work Mr. Tobin——

Q. And that was in prospects for the proposed tuna operation? A. Yes.

Q. When did the matter come to your attention of a proposed trip to Alaska?

A. About two days before we left. He mentioned something about shrimp in Alaska. [61]

Q. That would be May 16th or thereabouts?

A. Yes.

Q. Did you object to that?

A. I was under his orders; I had to go.

Q. My question is: Did you object to that?

(Testimony of Harry C. Lower.)

A. Inside, yes, I mean, but not outwardly to him, no.

Q. As far as anybody could discern, outwardly you did not object to that? A. No.

Q. You had no contract, either written or oral, for any wages to and from Alaska?

A. No, sir. [62]

* * * * *

Q. Did you make any inquiry as to whether Mr. [63] Tobin was the sole owner or whether there were any obligations against the boat?

A. Mr. Tobin told me he was the sole owner of the boat, and he had a mortgage on the boat.

Q. And you think he misrepresented to you on that account?

A. The date I signed my contract, yes.

Q. And you put up \$2500.00 relying upon what he said? A. Yes.

Q. And you now think you have been deceived?

A. Well, he didn't—

Q. Do you now think you have been deceived?

A. In what way?

Q. I am inquiring of you. Do you now think that Tobin deceived you? A. Yes.

Q. And the purpose of your lawsuit is to try to get back your \$2500.00 that he deceived you of?

* * * * * [64]

A. The purpose of my lawsuit is to get back—I had a contract to go to Greenland which amounted to \$8,000.00, and the salmon—I mean the tuna for the summer which I have lost, all the time I have

(Testimony of Harry C. Lower.)

lost, and everything I have lost, I am trying to get compensation for it.

Q. (By Mr. Carey): You are trying to get damages because you claim Tobin deceived you, is that right? A. Yes. [65]

* * * * *

Q. These proposed operations in Alaska, hauling freight back and forth possibly, engaging another boat, operating a hunting lodge and hauling passengers back and forth in connection with the hunting lodge, were [66] those operations to be conducted before you went tuna fishing or after you got back? A. Well, he said right then.

Q. Pardon? A. Right then.

Q. Did you agree to that proposal?

A. I was heartsick. I didn't know what to do.

Q. I didn't ask you about your condition. I asked you if you agreed to it.

A. Well, I had to. I was a crew member. Yes, sir.

Q. You did agree to it? A. Yes. [67]

* * * * *

Q. And I will ask you the direct question. Are you now saying that in negotiating this contract with you [71] Tobin told you the truth or deceived you?

A. You mean the whole contract—is it wholly true or wholly false?

Q. At the time you negotiated this contract with Tobin on April 17th and you put up \$2500.00, are

(Testimony of Harry C. Lower.)

you now claiming that Tobin told you the truth or
cheated you? A. Cheated me.

Mr. Carey: That is what I thought. That is all.

* * * * * [72]

(At 4:45 o'clock p.m., Tuesday, September
14, 1954, proceedings recessed until 10:00 o'clock
a.m., Wednesday, September 15, 1954.)

Seattle, Wash., Sept. 15, 1954, 10 o'clock a.m.

* * * * * [73]

Cross Examination—(Continued)

Q. (By Mr. Collins): Now, then, when did you
talk to Mr. Crutcher?

A. When? The first time?

Q. Yes. A. On June 5th. [75]

* * * * *

Q. Was that before or after you went to Her-
miston? A. That was before. [76]

* * * * *

Mr. Collins: No further questions. [80]

* * * * *

Redirect Examination

Q. (By Mr. Crutcher): Now, Mr. Lower, there
are a couple of points which I failed to clarify orig-
inally, and one of those was did you receive any
monies either from Mr. Tobin, the owner, or from
Capt. Moore, the master, or from Mr. Gehrig, the
business agent, or from any one else connected with
the Silver Spray for the services which you per-
formed aboard the vessel? A. No.

(Testimony of Harry C. Lower.)

Q. Was the \$80.00 which you received for ship money in Ketchikan sufficient for the needs of the vessel during the time you were in Alaska after Mr. Tobin left? A. No. [81]

* * * * *

Q. On cross examination you were asked whether you had been fired, in so many words, and you said no. Are you referring now to words of discharge used by Mr. Tobin or are you reaching a legal conclusion? * * * * *

A. Guess I was reaching a legal conclusion.

Q. (By Mr. Crutcher): Well, did Mr. Tobin ever ask you to leave the service of the vessel in so many words? A. No.

Q. You were also asked on cross examination whether you objected to going after shrimp in Alaska. Were you consulted by Mr. Tobin and asked for permission to go?

A. No. I was told we were going to Alaska.

Q. At any time did Mr. Tobin call a meeting [83] of the crew members or the working shareholders and either inform them or ask them anything about the abandonment of the tuna venture?

A. No. * * * * *

Q. You also said on cross examination that you agreed to work cargo in Alaska with the Silver Spray. Were you asked by Mr. Tobin for permission to engage in such work? * * * * * [84]

A. No.

(Testimony of Harry C. Lower.)

Q. (By Mr. Crutcher): Did you tell Mr. Tobin you wanted to go to Alaska? A. Yes.

Q. On what occasion was that?

A. Just before we left.

Q. In connection with what conversation was that remark made, do you recall?

A. Well, he said: "We are going to Alaska," and I said: "Okay".

Q. Was that in connection with the initial cruise? A. Yes.

Q. Had he told you or did you understand that you were not going tuna fishing? A. No.

Mr. Crutcher: I have no other questions.

* * * * *

The Court: Call the next witness. [85]

Mr. Crutcher: I wish to read into evidence the interrogatory and answer to interrogatory No. 1. This was filed on August 31, 1954 and is entitled "Interrogatories Propounded to Respondent".

* * * * *

Mr. Crutcher: The first interrogatory, No. 1: "On what date did you become the owner of the vessel Silver Spray?" Answer: "On or about April 28, 1954."

I wish next to read into evidence [86] interrogatory No. 8: "State whether you made any arrangements or agreement with any person or business firm to use the Silver Spray for tuna fishing during the 1954 season. If your answer is yes, state with whom you made the arrangement or agreement, and when." Answer: "Yes, I had arrangements with

(Testimony of Harry C. Lower.)

Lower, Herning, Peecher, Barquist, Bunker to use the vessel for tuna during the 1954 season." [87]

* * * * *

FERN LOWER

called as a witness by and on behalf of libelant Harry C. Lower, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Crutcher): Will you please state your name to the Court?

A. Fern Lower.

Q. And are you the wife of Mr. Harry C. Lower, the libelant in this action?

A. I am.

* * * * *

Q. And are you acquainted with the transaction [89] which took place in Spokane on April 17th?

A. I am. [90]

* * * * *

Q. Passing on now to the next time when you saw Mr. Tobin, did you ever see Mr. Tobin again?

A. No. That was the one and only time I ever saw him.

Q. Did you come to Seattle on June 5th?

A. I came to Seattle on June 4th.

Q. And that was—— A. Friday.

Q. The time the vessel arrived back in Seattle, was it not? A. The day following.

Q. Did you attempt to see Mr. Tobin on that day?

A. I attempted to find out where Mr. Tobin was.

(Testimony of Fern Lower.)

Q. And what sort of inquiry did you make?

A. I contacted Mr. Gehrig as to Mr. Tobin's whereabouts.

Q. And did Mr. Gehrig tell you?

A. Mr. Gehrig informed me that Mr. Tobin was in Spokane.

Q. Did you attempt to contact Mr. Tobin in [92] Spokane?

A. I did. I asked Mr. Gehrig for Mr. Tobin's telephone number. I called. Mr. Tobin was not there.

* * * * *

Q. Did Mr. Gehrig at that time make any representations to you as to the continuation of the tuna fishing venture?

A. May I relate my conversation with Mr. Gehrig?

Q. Very well.

A. I called Mr. Gehrig, and I said: "In view of the fact that Mr. Tobin has removed himself from the Silver Spray and removed himself from the City of Seattle, I am forced to get in touch with you as his business agent." I said: "I am at this time making formal [93] demand on you for the \$2500.00 which we used to purchase a share of the vessel." I said: "I believe you know, Mr. Gehrig, that we signed a contract with Mr. Tobin to go tuna fishing. The boat was to leave Seattle on May 15th. Today is June 5th." I said: "The boat is still here."

(Testimony of Fern Lower.)

Q. Did Mr. Gehrig say anything in answer to that?

A. He didn't get a chance to until just about that time, and then he said: "Mrs. Lower, I don't have any money. I have never at any time handled any of Mr. Tobin's money."

Q. Well, did he say anything about continuing the tuna venture?

A. No. Here is what he said. He said: "Give me an hour. I will see if I can get hold of Mr. Tobin. Then call me back." I said: "I will see if I can get hold of Mr. Tobin."

That is when I called Spokane. I couldn't locate the man so I called Mr. Gehrig back, and I said: "Now, if you would care to give us our \$2500.00, we will settle for that and go home and forget the fact that we have lost six weeks of work on the vessel; that we have been deprived of a season of fishing."

Q. Well, you don't have to go into that at this [94] time. I am primarily interested in what Mr. Gehrig had to say about the plans or intentions of Mr. Tobin.

A. He said: "Don't be hasty. Don't take any action. If the crew will stick together, we can still salvage something out of this. I know it looks bad, but I think we can incorporate and leave Mr. Tobin out of it."

Q. Was that, when he said "we", did you understand that he was referring to the working——

A. The crew members. * * * * *

(Testimony of Fern Lower.)

Q. When you said you had, during the course of your relation of that telephone call that you had, purchased a share of the vessel, did you misspeak yourself? Did you understand that you were purchasing a share of the vessel?

A. No. We understood we were purchasing a working share, and it was explained to us that that meant simply we went aboard and fished and had a share of the catch. [95]

* * * * *

Q. Was there any further conversation that you ever had with Mr. Gehrig or Mr. Tobin?

A. No. I told Mr. Gehrig at that time that if he couldn't settle with me—we would be glad to settle for the \$2500.00—if he couldn't, that we had to——

Q. No. That is not necessary.

A. Then that is all.

Mr. Crutcher: I have no other questions.

You may cross examine.

Cross Examination

Q. (By Mr. Collins): Mrs. Lower, you met with your husband and Mr. Tobin in Spokane?

A. I did.

Q. And you signed this agreement?

A. I did.

Q. You understood the agreement?

A. I understood it, yes. [96]

* * * * *

(Testimony of Fern Lower.)

Q. What led you to believe that Mr. Gehrig was Mr. Tobin's agent?

A. I said: "Mr. Gehrig, are you Mr. Tobin's [97] business agent, and he said: "Yes, I am."

Q. And so all the answers that you have given to Mr. Crutcher are based upon the fact that Gehrig claims that he was an agent?

A. Yes.

* * * * *

Q. But you have no confirmation of this agency from Mr. Tobin directly? A. No. [98]

* * * * *

Mr. Collins: I have no further questions.

Cross Examination

* * * * * [102]

Q. (By Mr. Carey): Referring to this conversation you had with Mr. Gehrig, did you have but one conversation with him?

A. I had two telephone conversations.

Q. I am referring to the occasion when you made a formal demand you say for \$2500.00.

A. Yes.

Q. Was that by telephone or face to face?

A. That was by telephone.

Q. Was that the only demand you made?

A. Yes.

Q. And that was on June 5? A. Yes.

Q. And where was your husband at that time?

A. He was standing right with me. [103]

* * * * *

(Testimony of Fern Lower.)

Q. (By Mr. Carey): Did you accuse Mr. Tobin of having treated you and your husband unfairly in connection with the execution of this undertaking?

A. Yes. May I state in what manner?

The Court: You may.

Q. Yes. Go ahead. That is what I am getting at.
Mr. Tobin, when we signed our contract with [105] him to go tuna fishing, said the boat would leave Seattle on the 15th day of May. This was June 5th. The boat wasn't tuna fishing and it wasn't ready to go tuna fishing.

Q. And you thought that he had misrepresented things to you and had overreached himself?

A. Yes.

Q. And that is what you accused him of?

A. Yes, I accused him of.

Mr. Carey: That is all. [106]

* * * * *

JOHN KADLEC

called as a witness by and on behalf of libelant Harry C. Lower, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Crutcher): Will you please state your full name to the Court?

A. John Kadlec.

Q. Where do you live, Mr. Kadlec?

A. 4409 26th S.W. [108]

* * * * *

(Testimony of John Kadlec.)

Q. What is your occupation?

A. I am going to school, Broadway Edison.

* * * * *

Q. Mr. Kadlec, you are one of the libelants in this cause, are you not? A. Yes.

Q. Have you had any experience with vessels of any kind?

A. I have had very little experience with vessels, but I have an AB card signed for the port of South Chicago.

Q. Have you had experience on some other vessel than the Silver Spray? [109]

A. SS Linderbury.

Q. In what capacity did you serve aboard that vessel?

A. Wiper, ordinary seaman and freight handler.

Q. What was your rate of pay in that work?

* * * * *

A. It was around \$500.00 a month, room and board.

Q. You mean \$500.00 plus room and board?

A. Yes.

Q. How did you first hear of Mr. Tobin?

A. I answered an ad in the Seattle Times.

* * * * *

Q. Did you later pay him some money for a working share in a vessel? A. Yes.

Q. When was that?

A. The 14th of April, 1954. [110]

Q. And what vessel was that that you agreed to work on?

(Testimony of John Kadlec.)

A. I agreed to work on the—the share was sold on the Sockeye. It also stipulated it was on the tuna clipper, the Silver Spray.

* * * * *

Q. Can you explain that briefly?

A. Yes. He told me that I would get a third of a share on the Sockeye, or, in other words, if I bought a place on the Silver Spray I would receive \$100.00 a week.

Q. And when did you go to work for Mr. Tobin?

A. Approximately the 28th of April.

Q. What vessel did you go aboard?

A. The Silver Spray.

Q. Did you ever work for the Sockeye?

A. A little bit off and on.

Q. Was this after the 28th of April or before?

A. This was after.

Q. And what sort of work did you do aboard that vessel?

A. I painted it and did mechanical work, in the lavatories and general cleaning, general hand on the [111] boat.

* * * * *

Q. Did you accompany the vessel to Alaska?

A. Yes.

Q. What did you do generally on the trip North?

A. On the trip North I was assistant engineer.

Q. Did you stand a regular watch?

A. Yes.

Q. Which watch was it?

(Testimony of John Kadlec.)

A. I don't recall the exact watch it was. It was at midnight I believe.

Q. Before you left on that trip did Mr. Tobin consult with you as to the taking of the vessel North? A. No.

Q. Did you accompany the vessel from Ketchikan to Wrangell? A. Yes.

Q. Did you stand any watch on that trip?

A. From Ketchikan to Wrangell I was helmsman.

Q. Did you stand a watch on the voyage from Wrangell back to Ketchikan? [112]

A. Yes.

Q. What watch was that?

A. It was the same watch.

Q. Did you see Mr. Tobin after you returned to Ketchikan?

* * * * *

A. He asked me if I was satisfied on this boat, this Silver Spray, and that if I was satisfied, he would not replace me when we got back to Seattle.

* * * * * [113]

Q. Did Mr. Tobin pay you any of the wages which accumulated up to that time?

A. I received \$5.00. That was all.

* * * * *

Q. Were you on the vessel when it returned to Seattle? A. Yes.

Q. Did you perform any service on that voyage?

A. On the return?

Q. Yes. A. Yes. I was a helmsman.

(Testimony of John Kadlec.)

Q. When you returned to Seattle, did you stay
[114] aboard the vessel? A. No. [115]

* * * * *

Q. While you were there aboard this vessel after it had returned from Seattle, did any person aboard the vessel remove his gear—or I should say—did you find, of your own knowledge, that any one aboard had removed his gear? A. Yes.

Q. And what person or persons were they?

A. Mr. Tobin's gear was removed.

Q. And who else, if any one?

A. I don't recall who else.

The Court: What day was this, if you know, [116] when you noticed Mr. Tobin's gear removed from the vessel?

Witness: On the morning of the 4th of June.

Q. (By Mr. Crutcher): Did you make any attempts personally to contact Mr. Tobin on the 4th, the 5th, or any preceding day in June?

A. I did through his business agent, Mr. Gehrig.

Q. Well, did you attempt through Gehrig to contact Mr. Tobin? A. Yes.

Q. Were you able to reach Mr. Tobin?

A. No.

Mr. Crutcher: I have no other questions.

The Court: Is there any cross examination of this witness relating to the questions addressed to him concerning the Lower claim set out in the Lower libel?

Mr. Collins: Yes, Your Honor.

May I have this marked?

(Testimony of John Kadlec.)

Clerk: Respondent's Exhibit A-3. Respondent's Exhibit A-4.

(Photograph marked Respondent's Exhibit A-3 for identification.) [117]

(Photograph marked Respondent's Exhibit A-4 for identification.)

Cross Examination

Q. (By Mr. Collins): You have before you, Mr. Kadlec, Respondent's Exhibits A-3 and A-4, which purport to be pictures of the Silver Spray. Do you recognize them? A. Yes.

Q. Is that the vessel you were on?

A. Yes.

Mr. Collins: I will offer them in evidence.

Mr. Crutcher: No objection.

The Court: Each of them is admitted.

(Respondent's Exhibit A-3 received in evidence.)

(Respondent's Exhibit A-4 received in evidence.)

Q. (By Mr. Collins): You said you were familiar with the supplies and gear aboard the vessel, is that right? A. Yes.

Q. Did you examine the fishing gear? [118]

A. No.

Q. Was there any gear aboard?

A. There was some; I wouldn't recall how much.

* * * * * [119]

Q. What gear of Tobin's was taken off the vessel when it got to Seattle?

(Testimony of John Kadlec.)

The Court: Do you mean his wearing apparel or something else beside wearing apparel?

A. Well, a radio and his sleeping bag and his personal belongings. [120]

* * * * *

Q. How much of Tobin's clothing was taken off?

A. There was none of Mr. Tobin's personal belongings left on board.

Q. When did you first meet Mr. Tobin?

A. About approximately April 12 of this year.

* * * * * [122]

Q. Now, on what date was that?

A. On April 13th.

* * * * *

Q. What did you talk about?

A. After his nephew left, we talked about this fishing venture, and I told him that I was not an experienced fisherman. I had never fished commercially in my life; that it was something I had always wanted to do; and he says: "Well, you don't need no experience in [124] this. We will teach you all you need to know." Therefore, I only had \$500.00 in cash, and the share was for \$1500.00, and as I was going to leave—I wanted to check with my wife first on it——

Q. I don't want to interrupt you, Mr. Kadlec. I want the whole story, and so does the Court, but were you not discussing the Sockeye at this time, another vessel? A. Yes.

Q. Now, please proceed then.

A. Then Mr. Tobin showed me a picture of the

(Testimony of John Kadlec.)

Silver Spray. He said: "I am planning on purchasing this boat." And he was telling me all about what a good boat—and he said: "If I decide to put you on this boat, that is where you will be," he said, "because you only have \$500.00 in this, and I want to put you wherever you are needed."

* * * * * [125]

Q. What did you talk about on the 14th?

A. That is when he took my \$500.00 and signed the contract, and that was all.

Q. You are still talking about the Sockeye?

A. Yes.

* * * * *

Q. Well, excuse me. On the morning of the 14th you gave him \$500.00, and you signed a contract on the Sockeye, and that was the entire conversation at that time?

A. Mr. Tobin also told me that if he decided to put me on this Silver Spray, which he showed me a picture of, that I would work for \$100.00 a week.

* * * * * [126]

Q. Did you tell anybody else on board that you were supposed to get \$100.00 a week?

A. No.

Q. Did any one ask you if you were getting \$100.00 a week? A. No.

Q. You knew the engineer was on a salary?

A. Yes.

Q. And you knew that Capt. Moore was on a salary? A. Yes.

Q. And also the cook?

(Testimony of John Kadlec.)

A. I did not know that. [132]

* * * * *

Q. Were you on board when Tobin left the vessel at Ketchikan? A. Yes.

Q. Do you know why he left the vessel?

A. No.

Q. You discussed it among yourselves that Tobin should go back to Seattle on ship's business, did you not? A. No.

Q. There was no talk at all?

A. None.

Q. Weren't you interested in why he left the vessel?

A. We were very much interested, sir, but that was beside the point.

Q. Beside what point?

A. Beside the point that he left and told the skipper that he ditched us there. [133]

* * * * *

(At 12:00 o'clock p.m., Wednesday, September 15, 1954, proceedings recessed until 2:00 o'clock p.m., Wednesday, September 15, 1954.)

Seattle, Wash., Sept. 15, 1954, 2:00 o'clock p.m.

* * * * * [137]

Mr. Collins: I believe all parties have stipulated and will agree that the contracts of Bunker, Peecher, Herning and Barquist may be introduced in evidence.

The Court: They may be marked respectively Respondents' Exhibits A-5, A-6, A-7 and A-8.

(Contract (Herning) marked Respondents' Exhibit A-5 for identification.)

(Contract (Peecher) marked Respondents' Exhibit A-6 for identification.)

(Contract (Barquist) marked Respondents' Exhibit A-7 for identification.)

(Contract (Bunker) marked Respondents' Exhibit A-8 for identification.) [143]

* * * * *

Mr. Wells: It was only with reference to these exhibits. I exhibited this check to Mr. Collins in the attorney's room and I understood there would be no objection to it. I show it to him now and ask that it be admitted in evidence.

The Court: As whose exhibit?

Mr. Wells: Intervening libellant Norman Bunker.

Mr. Collins: No objection.

The Court: Let the record show it is on behalf of Bunker.

Clerk: It will be Libelants' Exhibit 2. [144]

(Check marked Libelants' Exhibit 2 for identification.)

The Court: Then I understand counsel have no objection to the admission in evidence of Respondents' A-5, A-6, A-7 and A-8, being those blue contract forms which have been mentioned by Mr. Collins? Each of them is admitted accordingly.

(Respondents' Exhibit A-5 received in evidence.)

(Respondents' Exhibit A-6 received in evidence.)

(Respondents' Exhibit A-7 received in evidence.)

(Respondents' Exhibit A-8 received in evidence.) [145]

* * * * *

The Court: Libelants' Exhibit 2 is now admitted.

(Libelants' Exhibit 2 received in evidence.)

* * * * * [146]

Mr. Crutcher: The libelants Lower temporarily rest their case in chief.

Mr. Carey: Just for the purpose of the record, Your Honor, at this time I move to dismiss the libel so far as the libelant Lower is concerned for the reason that his uncontradicted testimony, as well as that of his wife, shows [147] conclusively and without any contradiction whatever that this is an action for fraud, not within the jurisdiction of an admiralty court.

The Court: The Court has considered the authorities cited yesterday further and also has considered some other authorities. The Court does now definitely deny the motion and overrules the objections.

You may have the witness sworn.

GEORGE S. HERNING

called as a witness by and on his own behalf, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Allison): Your correct name is George S. Herning, is it not? A. Yes.

Q. Where do you reside?

A. 738 North 74th, Seattle, Washington.

Q. And you are married, Mr. Herning?

A. Yes. [148]

Q. Do you have a family?

A. I have two children.

Q. Now, Mr. Herning, were you born in Alaska?

A. Yes.

Q. You spent some time in your youth in Alaska? A. Spent all of my youth.

Q. How many years did you live in Alaska?

A. 41 years.

Q. Now, as a resident of Alaska, have you had any occasion to be acquainted with the fishing industry?

A. Yes. I was raised in a fishing village on the coast.

Q. And does your experience, Mr. Herning, relate to any specific experience as a fisherman while you lived in Alaska?

A. Yes. I have set net, drift netted, and fished out in the ocean on the boats, power boats.

Q. Have you had any experience in your fishing experience with diesel engines?

A. A certain amount, yes. [149]

(Testimony of George S. Herning.)

Q. Now, I believe, Mr. Herning, you testified your fishing experience had been limited to salmon fishing in Alaska? A. That is right.

Q. You had never been tuna fishing before?

A. No.

Q. Now, how did you become acquainted with the respondent Robert Tobin?

A. I seen an ad in the Seattle P.I.

Q. Do you recall when that was?

A. It was somewhere around about the 20th, I believe, of April.

Q. 1954? A. Yes.

Q. Do you recall the contents of that ad?

A. It stated, I believe, "share for sale in tuna clipper sailing for Southern Banks" or something to that effect.

* * * * *

Q. Well, you did subsequently talk to Mr. Tobin? A. Yes.

Q. When did this conversation occur with Mr. Tobin?

A. Well, Mr. Tobin I think the next day called me by phone. [151]

Q. That would be about April 21, 1954?

A. About that time, yes.

Q. Now, did you make an appointment with Mr. Tobin?

A. Yes, I did. I made an appointment, and he asked me to come down to the boat, the Silver Spray. [152]

* * * * *

(Testimony of George S. Herning.)

Q. Did Mr. Tobin explain to you in what respect the vessel would be used?

A. He said that he had a contract lined up with the Van Kamp Cannery at San Diego and the boat would be sailing approximately May 15th for California to go tuna fishing.

Q. Now, did you discuss with Mr. Tobin about tuna equipment aboard the vessel?

A. Not at that time, no.

Q. Well, did you subsequently discuss it with Mr. Tobin?

A. Yes, the next day when I went down again.

Q. That was about April 23rd?

A. About that time, yes.

Q. What conversation did you have with Mr. [153] Tobin concerning tuna equipment aboard the vessel Silver Spray?

A. He said that he had equipment that he purchased with the boat that was stored in a warehouse, and that when he got to California they were going to put on bait tanks and refrigeration in the boat.

Q. Now, Mr. Herning, did you notice any tuna equipment aboard the vessel when you went on board?

A. Well, yes, I noted that the trolling arms—there were two trolling arms on the boat that went up each side of the mast—could be let out, and there was a guard rail on the back of the boat, and in the hold it had storage bins. [154]

* * * * *

(Testimony of George S. Herning.)

Q. And, also, did he discuss refrigeration of the vessel?

A. He said they were going to put refrigeration on the boat.

Q. Now, when did you report aboard the Silver Spray? That is, to begin your employment.

A. I believe it was on a Monday, the 26th.

Q. Monday, the 26th of April, 1954?

A. Yes.

Q. Now, what did you do when you first reported aboard?

A. Well, I went aboard the boat, and Mr. Tobin told me to go down in the engine room and start cleaning up. There was a lot of stuff stored down there, under the bilge it was. There was a lot of things that had fallen down in the oil and water, and underneath the shell there there was a lot of stuff just thrown in, stored, and we started taking that out and putting it out on the deck and separating it.

Q. Now, Mr. Herning, did you confine your work aboard the Silver Spray to the engine room at all times [155] pertinent to this action?

A. At all times and the heating plant.

Q. Now, I understand from previous testimony that the vessel sailed May 17th for Ketchikan?

A. That is right.

Q. Did you so serve aboard the vessel during this voyage?

A. I did.

Q. In the engine room?

A. Yes, sir.

* * * * *

(Testimony of George S. Herning.)

Q. Did you learn during this voyage to Alaska that there were any experienced tuna fishermen aboard [156] the vessel?

A. Yes. There was no tuna fishermen aboard the vessel at all. No man had ever been tuna fishing.

Q. Have you had a previous conversation with Mr. Tobin relative to experienced tuna fishermen aboard?

* * * * *

A. That was one of the questions I asked Mr. Tobin. Was any of the men he had signed up, if they were tuna fishermen? He told me he had two men that had fished tuna. [157]

* * * * *

Q. Were you asked by Mr. Tobin whether or not you would agree to go to Alaska?

A. No.

Q. Is your testimony now, Mr. Herning, that you just went to Alaska with the boat as a crew member, is that correct? [158]

A. That is right.

Q. Now, there has been some testimony about a shakedown cruise to Alaska. The purpose was a shakedown cruise. Now, did you as an engineer aboard the vessel do any work on the engines during this trip to Alaska?

* * * * *

A. The pumps were not working, the bilge pumps, and we took them off and took them up to the Ketchikan Machine Works, and they worked them over and overhauled them.

(Testimony of George S. Herning.)

Q. Now, you came down to Seattle on the Silver Spray? A. That is right.

Q. And you served as engineer on that voyage back to Seattle? A. Yes.

Q. And after the vessel arrived in Seattle, will you tell the Court what you did?

A. We got in here—I believe it was on the Thursday morning—about five o'clock, and I told Capt. Moore that I was going to go home. [159]

Q. For liberty? A. Yes.

Q. Now, at the time you went home was all your gear and personal belongings still aboard the vessel?

A. Everything I had left right on the boat.

Q. Will you continue with your testimony?

A. When I left, I told Capt. Moore that if they wanted me or needed me, to call me at home, if anything came up, and I think it was about between ten and eleven o'clock Thursday morning the phone rang and I answered it, and Mr. Tobin was on the phone, and——

Q. Just a minute. Will you tell the Court what date this telephone conversation occurred with Mr. Tobin?

A. That was Thursday, Thursday morning around about between ten and eleven o'clock.

Q. Would that be Thursday morning, June 3, 1954?

A. Yes. It was the morning we got in port.

Q. June 3, 1954? A. That is right.

Q. Now, will you tell the Court the essence of

(Testimony of George S. Herning.)

this conversation between you and Mr. Tobin on the telephone?

A. Mr. Tobin asked me if I thought that I could handle the engine room alone. [160]

Q. And what did you answer?

A. I told him that I thought I could handle the engine room sufficiently, and he told me that he would contact me later.

* * * * *

Q. And during this conversation did Mr. Tobin mention anything about whether the vessel would sail for Southern waters?

A. No, he didn't not at that time. It was a very short conversation.

Q. Now, since that phone call from Mr. Tobin, have you seen or talked to him prior to this litigation in this Court in the last few days?

A. No. I have not. [161]

Q. Have you tried to locate Mr. Tobin?

A. Yes, I have, at different times.

Q. Have you held yourself out and available to serve aboard the Silver Spray as assistant engineer?

A. I have.

Q. Since the conversation with Mr. Tobin?

A. That is right.

Q. Now, when you last went aboard the vessel, can you tell the Court what the status of the fuel supply was aboard the vessel?

A. Oh, I would say there was in the neighborhood of—the fuel tanks I would say were about half capacity, filled to about half capacity.

(Testimony of George S. Herning.)

Q. What about provisions and stores?

A. Stores were very, very low.

Q. Now, after this phone call, this phone conversation with Mr. Tobin on the morning of June 3rd, did you go back aboard the vessel?

A. I went back that afternoon, I think about one o'clock, and stayed there until nearly four o'clock.

Q. And did you go back on the vessel after that?

* * * * *

A. Oh, yes. I went back every day to the vessel.

* * * * * [162]

Q. When did you finally remove all of your gear from the vessel?

A. I think it was on a Tuesday afternoon following our arrival here.

Q. That would be——

A. Approximately about the 8th, I believe. [163]

* * * * *

Q. Did you ever make a formal demand upon Mr. Tobin for the return of the \$2500.00 that you invested as a working share?

A. No. I never could contact the man.

Q. Was there a period of about a month that you were in Seattle before you became employed with MacPherson Realty?

A. Yes, approximately a month.

Q. What did you do during that month?

A. I didn't do anything. I just was waiting to get some word.

Q. Some word from whom?

A. From Mr. Tobin.

(Testimony of George S. Herning.)

Q. In other words, your testimony is that during this month you held yourself available to continue serving aboard the Silver Spray?

A. That is right. * * * * * [164]

Q. Mr. Herning, the last question which I will ask you now is, as a man who had had previous fishing experience in Alaska, did you consider the Silver Spray equipped for tuna when you went aboard?

A. No, I don't. It was equipped partly, but it had to have bait tanks, and it had to have some kind of refrigeration for tuna fishing.

Q. Now, assuming these two facts, that the bait tanks and refrigeration would be put aboard in California, as Mr. Tobin told you, did you consider the vessel then equipped for tuna fishing?

A. Yes.

Q. Now, you have testified that Mr. Tobin told you he had a contract with Van Kamp's?

A. He said he was lined up with Van Kamp's at San Diego.

Mr. Allison: You may examine. [165]

Cross Examination

Q. (By Mr. Collins): Mr. Herning, how many years have you fished for salmon in Alaska?

A. Oh, off and on, I would say probably five to six years.

Q. What type of fishing?

A. Drift netting, set netting, and trap fishing.

Q. On a lay basis? A. (No answer.)

(Testimony of George S. Herning.)

Q. Do you understand what I mean? Well, I will change the question. On a share basis?

A. On a share basis, yes, sir.

* * * * *

Q. Being on a share basis, you knew that in [166] this Tobin venture you would be paid out of the share of any catch that might have been made?

A. That is right.

Q. And you are well aware of the risks of fishing then? A. That is right.

Q. When you speak of bait tanks on board the Silver Spray, do you know the difference between bait fishing and jig fishing insofar as tuna is concerned?

A. I have never been tuna fishing. I don't know a thing about tuna fishing, sir. I stated that.

Q. Did you see any equipment on board for fishing tuna?

A. No, no gear. The poles were up, and the hold was equipped for ice and storage, and the guard rail was on the back of the boat.

Q. There were lines aboard, were there not?

A. I didn't see any lines. I understand those were stored in the warehouse down at Lake Union; the fishing equipment was there.

* * * * *

Q. Will you tell me the circumstances of Mr. Tobin's departure from Ketchikan to Seattle? [167]

A. I don't know.

* * * * *

(Testimony of George S. Herning.)

Q. When did you first notice Mr. Tobin's absence?

A. I forget. Somebody come on board and said that he had left that afternoon for Seattle by plane.

Q. For what purpose?

A. I don't know what the purpose was for.

Q. Well, weren't you curious as to the purpose?

A. I was in a way, but nobody seemed to know.

Q. Now, in the courtroom we have Capt. Moore, Mr. Tobin, and Mr. Gehrig. Did any of them have a [168] conversation with you as to the purpose for Mr. Tobin's trip to Seattle?

A. I believe one of them did tell me after he had left that he was coming to Seattle to pick up some money.

Q. For the business of the Silver Spray, is that correct?

A. It wasn't stated to me what it was for.

Q. When you came back to Seattle—I understand from your testimony that you arrived June 3 and that seems to be established—you then went home?

A. That is right.

Q. Where is your home?

A. 738 North 74th.

Q. In Seattle? A. Yes.

Q. Prior to that, you had contacted Tobin in Spokane or where?

A. Prior to that?

Q. Prior to June 3?

A. I contacted Mr. Tobin right here in Seattle.

Q. In Seattle?

A. Aboard the Silver Spray.

(Testimony of George S. Herning.)

Q. Did you know his address?

A. In Spokane? [169]

Q. Yes. A. No, sir, I did not.

Q. Did you ever telephone Mr. Tobin or his wife in Spokane? A. No, I did not.

Q. Then on June 3, about ten o'clock, Mr. Tobin telephoned you at your house?

A. That is right.

Q. And asked you if you could handle the engine room? A. That is correct.

Q. For the purpose of proceeding with the venture?

A. He didn't say anything about where we was going or where he figured on going. He just asked me that question—if I thought I could handle the engine room—and I said I thought I could, and he said: "I will contact you later", and he hung up.

Q. Well, your understanding was at that time that you were going to take the boat out some place for some operation?

A. I presumed that it was going to go somewhere, but where I didn't know. [170]

* * * * *

Q. What happened the next day, June 4th, which is a Friday?

A. I went down to the vessel in the morning, stayed down there about, oh, I don't know, two or three hours. Nobody came around so I went back home again.

Q. Wasn't Helwig there on the 4th?

A. Yes, he was.

(Testimony of George S. Herning.)

Q. And who else?

A. I believe Capt. Moore was aboard, too.

Q. Did Capt. Moore tell you that Tobin had to go to Spokane because his little girl was sick? [171]

A. It seems to me like somebody did tell me that, but I don't recall who it was.

Q. Well, please detail the events of Friday, June 4th, as well as you can recall.

A. I was down to the boat for approximately—I would say three or four hours—and there was only two or three men there, and there was nothing doing. We just sat around and talked. So I went home, and I left word with them—I think Mr. Peecher was there—I left word later on during the day if they wanted me or if anything took place, if Mr. Tobin came, why, to contact me at home by phone.

Q. Now, on June 4th, you say some men were there and you sat around and talked. What men were there?

A. Mr. Peecher was there, I believe, and Mr. Barquist.

Q. What did you talk about?

A. Nothing, in general. Just waiting for Mr. Tobin to come.

Q. You knew the boat had to go in drydock?

A. Well, I presume it had. It had struck a log, had propeller trouble.

Q. And you knew there would be some delay for three or four days before any operation could be put into effect, didn't you? [172]

(Testimony of George S. Herning.)

A. Yes, that is right. [173]

* * * * *

Q. Now, then, Mr. Herning, when, where, and under what circumstances and who was present, if any one was present, did Tobin fire you?

* * * * *

A. Tobin, he never fired me.

Q. When did you decide to try to get your \$2500.00 back? [175]

* * * * *

A. It was approximately I would say about two weeks after we arrived in port. Mr. Gehrig told me that Mr. Tobin had a lawyer. I believe his name was Swontkoski, and I called up Mr. Swontkoski on the phone.

* * * * *

Q. Well, please proceed, sir.

A. (Continued) I asked Mr. Swontkoski where I could get in touch with Mr. Tobin, and he asked me what I wanted, and I told him that I understood the vessel had been attached and that I would like to get in contact with Mr. Tobin to find out what he was going to do. He [176] told me over the phone—he said: “I will notify you within two or three days what is going to take place.” About the third or fourth day after that conversation I received a letter from Mr. Swontkoski by registered mail stating—I can’t say word for word—but stating that Mr. Tobin was going to take care of the shareholders and the money that they had invested in the boat. [177] * * * * *

(Testimony of George S. Herning.)

Q. Did you understand the share agreement which you signed? A. Yes.

Q. Did you read it? A. Yes.

Q. You understood that in the event Mr. Tobin should release you that he would have ninety days to pay your money back?

A. That is right.

Q. You also understood that if you wanted to leave the vessel you were to give him thirty days' notice? A. That is right.

Q. Did you do so?

A. I gave his lawyer the notice when I called him up over the phone.

Q. Was that thirty days?

A. It was approximately two weeks after we arrived in Seattle. [178]

Q. Now, the fact is, Mr. Herning, that you did not give Mr. Tobin any time within the contract you signed to keep that vessel in operation, sell your share, and pay you the money back, did you?

A. I couldn't get in touch with Mr. Tobin at all. I waited for two months trying to get some word from the man.

Mr. Collins: I have no further questions.

Cross Examination

Q. (By Mr. Carey): In order that I may be sure of the dates so far as it affects my clients, you went aboard the vessel here in Seattle on April 26, 1954? A. That is correct.

(Testimony of George S. Herning.)

Q. From April 26 to May 17th you were doing work on her here in port?

A. That is right.

Q. Here in Seattle? A. That is right.

Q. Then on May 17 you started on this trip to Alaska? A. That is correct.

Q. And during that time you were doing engine room work? [179] A. That is right.

Q. And you arrived back in Seattle then on the morning of June 3rd?

A. That is correct.

* * * * *

Q. You had no separate agreement with him concerning any wages for this trip to Alaska and back? A. No.

Q. Do you recall, Mr. Herning, the date on which you put up the \$2500.00? [180]

* * * * *

A. It was the day that I signed the contract. I give him the check.

Q. Well, that answers it then. Is it your claim, Mr. Herning, that you put up this \$2500.00 because Mr. Tobin misrepresented to you about this proposed trip and the availability of the boat for tuna fishing? A. That is right.

Q. And what you are really complaining about is that he did misrepresent to you, got \$2500.00 from you, and you want to get that back, is that it?

A. Well, I want to get back what I figure I [181] having coming.

Q. And that is the \$2500.00 you put up?

(Testimony of George S. Herning.)

A. That is right.

Mr. Carey: That is all.

Redirect Examination

Q. (By Mr. Allison): Mr. Herning, did Mr. Tobin make any representation to you during the time you discussed this contract about the earnings you might expect to earn from the fishing season?

A. I believe that was discussed, and it was said some of the boats made as high as \$5,000.00 in just the fall fishing alone, \$5,000.00 per man.

Q. Based on that conversation with Mr. Tobin you bought into this fishing share arrangement, is that correct? A. That is right. [182]

* * * * *

Q. Mr. Herning, when did this conversation with Mr. Tobin about the anticipated earnings occur?

A. That was the first day I talked to him on the boat.

Q. That was the day that he told you that some vessel earned so much money and other vessels earned a different amount, is that correct?

A. That is right. [183]

Mr. Allison: I think that is all.

Recross Examination

Q. (By Mr. Carey): Mr. Herning, in view of your experience in fishing in Alaska, you know that nobody can predict three, four or five months in advance what the run of any fish will be, don't you?

A. That is right.

(Testimony of George S. Herning.)

Q. And that would apply to tuna as well as salmon? A. That is right.

Q. So this opinion of Tobin was just a hope, not a guarantee?

A. It was based on what the boats that had been there the previous fall had made.

Q. You knew it was what he hoped to do, that is all? A. It could be.

Mr. Carey: Yes.

Mr. Allison: That is all.

Mr. Collins: No questions.

The Court: Step down.

(Witness excused.) [184]

* * * * *

Mr. Armstrong: If the Court please, I would like to Call Mr. Peecher at this time.

EDGAR L. PEECHER

called as a witness by and on his own behalf, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Armstrong): Your name is Edgar L. Peecher? A. That is right.

Q. And where do you reside, Mr. Peecher?

A. 8015 S.W. 45th Street, Portland, Oregon.

Q. How long have you lived in Portland, Oregon? A. Oh, about thirty years. [185]

* * * * *

Q. Had you ever had prior to April 1954 any experience as a commercial fisherman?

(Testimony of Edgar L. Peecher.)

A. None whatsoever.

Q. Were you familiar with vessels prior to April of 1954?

A. Well, I had longshored for ten years. I had been on many, many boats, not necessarily fishing boats.

Q. How did you come in contact with Mr. Tobin?

A. I saw an ad in the Seattle P.I. It said: "Commercial fishing, tuna clipper, leaving for Southern waters."

Q. Do you know approximately when you saw that?

A. It was sometime the latter part of April.

Q. What did you do with regard to the ad?

A. I wrote a letter and inquired.

Q. Did you get a response to your inquiry?

A. I got a telegram, yes. [186]

Q. Who did you receive that telegram from?

A. I received the telegram from a man by the name of Flagler.

* * * * *

Q. Did you discuss with Mr. Flagler anything about the vessel Silver Spray?

A. Yes, I talked with him about it, and he said that the man that owned the boat had just left to go to the boat, and he told me where the boat was at, and if I wanted to talk to Mr. Tobin about the project that I should go down to the boat tied up at Pacific Fishing & Trading Company.

Q. Did you do that? [187]

A. After I had my dinner, I did that, yes.

(Testimony of Edgar L. Peecher.)

Q. Do you know what day that was on?

A. It was the latter part of April. I don't recall the exact date.

Q. You did go to the vessel you have said. Who did you see on the vessel?

A. I saw Mr. Tobin.

* * * * *

Q. Will you relate, as closely as you can remember, the conversation that took place between you and Mr. Tobin on that occasion?

Q. I inquired into what the venture was going to [188] be, what their plans were as to what they were going to do with the boat. They said they were going to San Diego on tuna fishing and——

Q. Did he tell you whether or not he had a contract to fish in San Diego?

A. Yes. He told me that the ship was **contracted** to Van Kamp's Cannery, that they would get bait tanks and refrigeration at San Diego. It was supposed to leave no later than May 15th, and was supposed to be in San Diego at Van Kamp's Cannery no later than June 1st. The ship was contracted to Van Kamp's Cannery.

Q. Did you discuss with Mr. Tobin on that occasion anything with regard to who or what the experience of other crew members was?

A. Yes, definitely.

Q. What did you have to say to him or he have to say to you about the experience of other men on board the vessel?

A. The first thing I told him was that I had had

(Testimony of Edgar L. Peecher.)

no fishing experience myself, but I asked if he had any experienced men in the crew. He said he had two experienced San Diego fishermen. They weren't aboard the boat and wouldn't be aboard the boat until we got to San Diego. They both had very important jobs in Seattle, and after we got to San Diego they would quit their jobs and [189] fly down so that they could stay on their jobs here as long as possible. He also told me that a man by the name of Jim Gehrig was going to navigate the boat down to San Diego for us as a courtesy, and then he would in turn fly back, that he was not going to go fishing.

Q. Did he tell you who was going to be the skipper or captain of the boat?

A. He was the captain or skipper.

Q. Did he say anything about the prospective earnings or earnings which you could expect to make on this venture?

A. Yes, sir.

Q. What did he say?

A. From \$5,000.00 up.

Q. Did you inquire as to the gear that was on board the vessel?

A. Yes, I did.

Q. To what extent did you inquire?

A. Mr. Tobin took me over the ship. I formed the opinion, my own opinion, that the ship was sound, but not knowing what was required for tuna fishing other than the bait tank, I didn't know whether there was sufficient fishing gear on there or not. I did see that they had two fishing arms, one on each side of the boat. They were up. But there

(Testimony of Edgar L. Peecher.)

was no other gear to my knowledge on the ship.

* * * * * [190]

Q. And did you pay him any money for a working share in the vessel?

A. At that time, when I agreed to take the share, I gave him \$20.00, all the money I had in my pocket, to show my earnestness in it, and then in a day or two I had a check sent from Portland and handed the check to him in full.

Q. In what amount of money?

A. \$2500.00.

Q. Did you go on board the boat during April?

A. I didn't go to stay.

Q. When did you first go to work on the boat?

A. I even went to work on the boat before we signed the contract. I quit my job at Pacific Car & Foundry and come down and helped them paint and make ready.

Q. You signed your contract on May 4th, so you mean some time prior to that? [191]

A. Sometime prior to that, yes, I worked on board the ship.

Q. How long did you continue to work on board the vessel prior to the time it departed for Ketchikan, Alaska?

A. I worked right up all the time.

Q. Were you on board the vessel every day?

A. Every day.

* * * * *

Q. What was your understanding with Mr.

(Testimony of Edgar L. Peecher.)

Tobin as to what you were to do after you signed the contract?

A. I told Mr. Tobin that I had formerly been a longshoreman; that I didn't know anything about the navigation of a boat; but I did know about stowing cargo and taking care of the ship's gear, and such as that. So I was told by Mr. Tobin that that would be my job, to take care of the hold and any cargo that should be put in.

Q. Where were you to go and for how long were [192] you to be employed?

A. We were supposed to go to San Diego on a tuna fishing trip, and to the best of my knowledge it was from now on.

Q. You mean from then on?

A. From then on, yes. There was no set period of how long we would be on the trip.

Q. Were you going to stay there for the full 1954 tuna fishing season?

A. Yes, sir.

* * * * *

Q. What was said by you or by Mr. Tobin to you with regard to the departure of the vessel for Ketchikan from Seattle?

A. He come aboard the ship one afternoon about, [193] oh, somewhere between 2:00 and 4:00, and said: "We are going to Alaska in the morning." That was all the consultation that was held with me.

Q. Were you given any opportunity at all to or permitted to express your opinion as to whether or not you desired to go to Ketchikan?

(Testimony of Edgar L. Peecher.)

A. None.

* * * * *

Q. Did you say anything to Mr. Tobin about going to Alaska? A. I did.

Q. What did you say?

A. I told Mr. Tobin that I, as one individual, didn't care to go to Alaska; that that wasn't what I come aboard the ship for; I come aboard the ship to go to San Diego on a tuna fishing trip.

Q. What did he say?

A. Well, he said: "Why take a chance on tuna fishing when you can go to Alaska and make all this money? There is going to be a lot of money made by the ship, and all these men have to have wages coming in"—he had ten [194] men aboard—"they have families to worry about making a living for"—and he couldn't let one man interrupt that.

Q. Did you have any choice as to whether or not you could go to Alaska?

A. I had no choice.

Q. You did go to Alaska?

A. I did go to Alaska.

Q. When did you leave the vessel?

A. Some time after the vessel came back from Wrangell to Ketchikan.

Q. Under what circumstances did you leave the vessel?

A. After we got to Alaska we run into very severe weather from my standpoint.

(Testimony of Edgar L. Peecher.)

Q. Will you explain what you mean by "your standpoint"?

A. I am subject to arthritis, and the weather was very damp, moist, cold up there, and it didn't agree with my health at all. I began to swell up in my hands and my ankles, my knees, so I could see there was only one thing for me to do was to get out of Alaska.

Q. So what did you do in that regard?

A. I asked Mr. Tobin if I could come back to Seattle and get out of it. [195]

Q. Now, at that time, did you ask Mr. Tobin whether you could be completely released from the vessel or what was the subject of your conversation?

A. Mr. Tobin took one look at me and he said: "I realize that you have no business up here." So he said: "I am not going to try to hold you here in any way." He said: "I am going back to Seattle today by plane, and if you want me to, I will get two tickets while I am at it, and we will both go together." And I said: "That is all right with me. Get the tickets." He asked me if I had the money to pay my own way, and I told him I did. I paid my own way.

Q. Was anything said about your rejoining the vessel when it returned to Seattle?

A. To my knowledge there wasn't.

Q. You mean there was nothing said?

A. No.

(Testimony of Edgar L. Peecher.)

Q. Well, were you leaving the vessel permanently when you left it in Alaska?

A. If the vessel was going to stay in Alaska, I would have left it permanently, yes.

Q. But had the vessel gone to California tuna fishing, what would you have done?

A. I would have gladly went along.

Q. As a matter of fact, you did come back to the [196] vessel when it arrived in Seattle with the intention of going on board and going to California, did you not?

A. That is right. * * * * * [197]

Q. When you talked with Mr. Tobin in Ketchikan on your return, did he say anything at all with regard to what he intended to do with this vessel, the Silver Spray?

A. At that time he said he was going to keep it there and open a lodge. They were going to use the vessel to take their prospective clients back and forth from the lodge to the airport or whatever it was necessary to use the boat for; that he had planned that for many, many months and he intended to keep it there.

Q. He advised you at that time then that he did not intend to go on this tuna fishing venture? [198]

A. That was the understanding that I had, yes.
* * * * *

Q. When did you board the vessel, Mr. Peecher?

A. In Seattle? I boarded the vessel on June 4.
* * * * *

Q. Was Mr. Tobin on board on the 4th?

(Testimony of Edgar L. Peecher.)

A. No, sir.

Q. Did you have occasion to observe whether or not his gear was on board the vessel when you went on board on the 4th of June?

A. Yes, I did. [199]

Q. Was the gear there or not?

A. No, it wasn't. [200]

* * * * *

Q. How long did you stay around the vessel or keep returning to the vessel, Mr. Peecher?

A. Several days.

* * * * *

Q. Did Mr. Tobin come on board the vessel during any of those days or contact the vessel to your knowledge? [201]

A. Not for several days he didn't.

* * * * *

Q. Were you present when he came on board on the evening of the 7th? A. Yes, I was.

Q. What conversation took place between Mr. Tobin and the crew members on board?

A. Well, Mr. Tobin walked into the galley of the ship. All of us were sitting in the galley. And he said that any one that was interested in the procedure to come and go with him to his lawyer's office.

Q. About what time of the evening was that?

A. I would say somewhere after 7:00 o'clock.

Q. In the evening? A. In the evening.

Q. What further was said in your presence on his boarding the vessel on that occasion?

A. There was two or three different ones that

(Testimony of Edgar L. Peecher.)

[202] asked him what he was going to do, what they were going to do, or what the general opinion was, and the only answer that I heard him give was that they was to go see his lawyer and it would all be thrashed out there, and that he had the money waiting there for any of those that wanted their money out of the venture.

Q. Did you go with him to see his lawyer?

A. No, I didn't.

* * * * *

Q. Did Mr. Tobin on the 7th of June say anything about his intentions to fish for tuna?

A. He never said anything then but I had received a letter from Mr. Tobin at my home in Portland after I come [203] back from Ketchikan telling me that the vessel was coming back, that they were going to San Diego fishing, and wanted to know if I wanted to continue on the voyage.

Q. Did he say anything about that letter when you talked to him on the 7th?

A. No. He never did.

Q. Was there any mention at all of the vessel departing for San Diego or for fishing for tuna?

A. Not that day, no.

* * * * *

Q. Which one of these persons said anything to [204] you about the plans of the vessel?

A. Jim Gehrig.

Q. Did you ever have any discussions with Mr. Tobin with regard to what relation Jim Gehrig had to the vessel Silver Spray or to Mr. Tobin?

(Testimony of Edgar L. Peecher.)

A. I was told by Mr. Tobin that Mr. Jim Gehrig was his business agent.

Q. Is it a fact or is it not a fact that the ad which you answered claimed and stated in it that Mr. Gehrig was the business agent?

A. That is right.

Q. I will now ask you the question what did Mr. Gehrig tell you about the plans of the Silver Spray?

A. Well, the statement that Mr. Gehrig made after the vessel came back from Ketchikan was that there could be something salvaged out of the whole venture then if we all got together and formed a company or some such thing and tried to remove Mr. Tobin from it, because he had felt like, as far as Mr. Tobin was concerned, he was all through with the venture. That was his idea. So there was talk of hauling apples back to Alaska or hauling knock-down defense homes or different things were brought up in different subjects and different conversations, but nothing concrete come out of any of it.

Mr. Armstrong: I have no further questions.

Cross Examination

Q. (By Mr. Collins): Mr. Peecher, when you left the boat in Ketchikan, you did so of your own free will?

A. That is right, with the consent of Mr. Tobin.

Q. You rode back on the plane with Tobin?

A. That is right. * * * * *

(Testimony of Edgar L. Peecher.)

Q. You knew he was coming down on Silver Spray business? A. No. I did not.

Q. What was he coming down for?

A. The only reason he gave me for coming to Seattle and going on to Spokane was that a man had to see his family once in a while.

Q. Didn't you know anything about the arrangement with Shell Fish, Incorporated?

A. Only hearsay.

Q. I will waive the hearsay rule if you will tell me what you know about it. [206]

A. I heard that we were supposed to have a load of fish at Wrangell to haul down for Shell Fish, Incorporated, I believe it was.

Q. You went to a port in Alaska to pick up shell fish? A. That is right.

Q. And there wasn't a cargo?

A. That is right.

Q. And Mr. Tobin went down to Seattle to straight out the arrangement?

A. Mr. Tobin didn't stop in Seattle other than to change planes, the same as I did. He went to Spokane, and I went to Portland.

* * * * *

Q. You were willing to leave the ship entirely at Ketchikan?

A. As long as it was going to stay in Alaska, yes.

Q. And you were willing to sell your share back to Tobin? [207]

A. If the vessel was going to stay in Alaska, I

(Testimony of Edgar L. Peecher.)

wanted no more to do with it, because I couldn't stay there on account of my health.

Q. Didn't he offer to pay you for your share?

A. No. He never did.

Q. Did he offer to try to sell another share and pay you your money back?

A. Yes, he offered that.

Q. You signed one of these general contracts, did you not? A. I did.

Q. And he offered to comply with the terms of that contract?

A. He offered at that time, yes.

Q. Now, you mentioned this hunting lodge. Didn't you and Tobin discuss many enterprises, including the hunting lodge, maybe fishing off Honolulu, off San Diego, maybe carrying freight to Alaska, and using two or more different boats in all these ventures?

A. I could answer that question by telling you this—that every time I heard Mr. Tobin talking about anything after I signed my contract, it was a different proposition every time.

Q. They were all business suggestions, in other words? [208]

A. I would suppose they would be.

Q. And you were willing to be convinced as to the plausibility of any of them, were you not?

A. No, sir.

Q. Well, at least you were interested in working with him up to the time that the venture folded?

A. My primary reason for going aboard the ship

(Testimony of Edgar L. Peecher.)

was to go tuna fishing off San Diego. If I had known that the vessel was going North of Seattle, I would have never went into the venture. I told him the only reason I wanted to go on it was because it was going South, where it was warm, where I would feel good. Mr. Tobin or nobody else can say that is not true because it is true. There was nothing ever said to me about going to Alaska or anywhere else other than San Diego until after I had my \$2500.00 in it. [209]

* * * * *

The Court: Will there be considerable more cross examination?

Mr. Collins: Yes, Your Honor.

The Court: Then I think we ought to suspend. Court is adjourned until tomorrow morning at ten o'clock. The witnesses are requested to be back again tomorrow unless the Court has otherwise directed.

(At 4:35 o'clock p.m., on Wednesday, September 15, 1954, proceedings recessed until 10:00 o'clock a.m., Thursday, September 16, 1954.) [210]

Seattle, Wash., Sept. 16, 1954, 10:00 o'clock a.m.

The Court: You may proceed with the case on trial. [211]

* * * * *

Q. (By Mr. Collins): When and where did Mr. Tobin discharge you?

A. I would say that he did when he abandoned the ship in Seattle. * * * * *

(Testimony of Edgar L. Peecher.)

Q. I believe you testified yesterday that from the time you and Mr. Tobin left the vessel in Ketchikan you had no further conversation about tuna fishing? [213]

* * * * *

A. No. I didn't say that.

Q. What did you say?

A. I said on the plane trip, while we was on the plane.

Mr. Collins: May I offer a document?

The Court: It will be marked.

The Clerk: Respondents' Exhibit A-9.

(Letters marked Respondents' Exhibit A-9 for identification.)

* * * * *

Q. (By Mr. Collins): You have been handed Respondents' A-9. There are two documents there, one a typewritten letter from Tobin to you and your reply to Mr. Tobin. Do you recall those documents? A. Yes, I do.

Q. Both of them? A. Yes, I do.

Mr. Collins: I will offer A-9, Your Honor. [214]

Mr. Armstrong: No objection.

The Court: Respondents' Exhibit A-9 is now admitted.

(Respondents' Exhibit A-9 received in evidence.)

* * * * *

Q. (By Mr. Collins): Now, as I have your notes here, you testified that as of June 3rd and for sev-

(Testimony of Edgar L. Peecher.)

eral days thereafter you planned to go tuna fishing with Mr. Tobin?

A. After I come back up to Seattle, yes.

Q. Well, did you change your mind after that letter? A. I did.

The Court: What was the date of your first return to Seattle after writing that letter?

Witness: June 4th. [215]

Q. (By Mr. Collins): As of May 29, you wanted your money back?

A. I would have taken it then, yes.

Q. Well, you wanted it back, did you not?

A. I would have accepted my money, yes.

Q. Did you make demand on Mr. Tobin at any time after May 29th for your money?

A. Yes. When I was told that he abandoned the ship, I asked him the first time I see him.

Q. Well, who told you that?

A. The balance of the crew that was on board ship.

Q. Well, name them, please.

A. Well, Harry Lower——

Q. Did Mr. Lower tell you that he talked to Tobin at the hotel, the Edmond Meany, on June 3rd?

A. I didn't see Mr. Lower on June 3rd. [216]

* * * * *

Q. Tobin came down to the boat and tried to get aboard, did he not?

A. Tobin came down to the boat on the evening

(Testimony of Edgar L. Peecher.)

of the 7th and got aboard, came right in the galley and talked.

Q. And you threatened him with physical violence, is that right? A. (Laughs.)

Q. I don't think it is funny, Mr. Peecher. Did you or did you not threaten him with physical violence?

A. Why, I might have threatened to punch him in the nose—might like to do it now.

Q. And who else wanted to punch him in the nose? A. No one to my knowledge.

Q. And then you, in harmony with these other men, put him back on the dock?

A. He went on the dock of his own free will. That is when he asked us all to go up to his attorney's office with him. He said everything would be straightened up at his attorney's. [218]

* * * * *

Q. Mr. Tobin suggested to you gentlemen that you see his lawyer and give him time to sell shares in the boat to other people so you men could be paid off, did he not? [219]

* * * * *

A. Yes.

* * * * *

Q. When did you first hear about this libel on the Silver Spray?

A. I first heard of Mr. Lower's contemplated [220] action on Saturday.

Q. That would be June 5th? * * * * *

Mr. Collins: I will terminate the examination.

(Testimony of Edgar L. Peecher.)

Cross Examination

* * * * [221]

Q. (By Mr. Carey): Your sole interest in the venture, as I understand, was to participate in this tuna fishing? A. That is right.

Q. You were not at all interested in the Alaska operation? A. Absolutely not.

Q. You had no contract to participate in that?

A. The contract called for tuna fishing in Southern waters.

Q. Yes, and that is the only contract you were interested in? A. That is right.

Q. You went to Alaska simply because the boat was [224] going there? A. That is right.

Q. And you went aboard pending the time it might come back and start to California waters for tuna fishing? A. That is right.

Q. Now, in answer just a few moments ago to a question asked you by Mr. Collins with reference to the occurrences on June 7, you said that on that date it was your disposition to punch Mr. Tobin in the nose. Why was it that you felt inclined to punch him in the nose? Was it because you felt that he had defrauded you?

A. I had already made up my own mind that I couldn't believe a word the man said.

Q. Well, did you think he had defrauded you in getting you into this deal? Was that it?

A. I certainly did.

Mr. Carey: That is all.

The Court: Any further questions of this witness?

Mr. Armstrong: No.

The Court: Step down.

(Witness excused.) [225]

* * * * *

HERVEY PETRICH

called as a witness by and on behalf of libellant Harry C. Lower, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Crutcher): Will you state your full name? A. Hervey Petrich.

Q. Where do you live Mr. Petrich?

A. I live at 3424 North 19th in Tacoma, Washington.

Q. What is your occupation?

A. I am affiliated with the Western Boatbuilding Company in Tacoma who build vessels, mainly fishing vessels, and my particular operation is to take care of the fishing boats in our fishing fleet owned by this company.

Q. Do you have a title as to that?

A. Nothing more than we are five brothers together, and we are all partners, and we don't give anybody any title over the others. [226]

Q. How long have you been connected with fishing vessels and fishing in general?

A. Oh, I have been with the company all my life. I would say in this particular operation actively engaged for 25 years.

(Testimony of Hervey Petrich.)

Q. During that time have you had any connection with the tuna fishing industry?

A. I have, yes.

Q. Does your company build tuna vessels?

A. Yes, we do.

Q. Does your company own any tuna fishing vessels? A. Yes, we do.

Q. Do you operate any tuna fishing vessels?

A. Yes. We are managing and owners of five tuna clippers and five purse seiners.

Q. In connection with that sort of work, have you had occasion to work in Southern California, particularly San Diego or in the Los Angeles area in connection with the tuna industry?

A. My work keeps me in Southern California most of the year.

Q. How long have you been doing that sort of work in Southern California?

A. Well, the active part has been most prominent since the end of World War II. [227]

Q. Would it be since 1946?

A. Since 1946, yes. However, I have been in it previous to the war—in other fields.

Q. I understand. Now, in connection with your work, do you have occasion to know about the catches of tuna and the prices paid for tuna in Southern California?

Mr. Collins: I object to the question and the answer of this witness upon the ground that it is irrelevant and incompetent insofar as these particular

(Testimony of Hervey Petrich.)

libelants are concerned. I would like to argue that objection.

(Argument.)

The Court: Do you wish your objection to run to all this line of testimony?

Mr. Collins: Yes, Your Honor.

Mr. Crutcher: No objection on my part.

The Court: The Court approves. Therefore, you may proceed but be certain to have in mind that the Court will later examine this, so if there are any aspects of it or objections that you think you might be alerted to by reason of their being stated, it is up to you to be so alerted.

Mr. Crutcher: Thank you, Your Honor. I will withdraw my previous question. [228]

Q. (By Mr. Crutcher): Mr. Petrich, will you tell the Court briefly what a tuna clipper is?

A. The interpretation of a tuna clipper is synonymous with a typical vessel found in Southern California in which they have tanks to carry live bait, and this live bait is thrown into the water, attracts the tuna, and the fishermen with poles and hooks or lures will bring the tuna back into the vessel.

Q. Does such a vessel have any refrigeration?

A. Normally, a large tuna clipper is completely refrigerated.

Q. Now, with reference to the size of tuna clippers, can you, as a boat builder, state the approximate range of size so far as length is concerned of a tuna clipper?

(Testimony of Hervey Petrich.)

A. Well, the vessels that we have been building up North for the Southern trade have been limited to the sizes from 85 feet to 170 feet. However, they do build smaller tuna clippers down as low as 45' and 50'.

Q. In the course of your work which you have described to the Court, do you have occasion to learn of the catches made by the various tuna clippers operating out of San Diego?

A. All records are always available to me. In [229] fact, that is the basis of determining whether a man is capable of running a vessel or not.

Q. Now, can you state to the Court whether there is such a thing as an average catch for tuna clippers of a particular size, that is, year after year?

A. Well, there is usually an average catch which is determined at the end of a season. We cannot determine and predict what the season will hold in the future.

Q. Does that average catch vary from year to year?

A. That average catch does vary, yes.

Q. Are you acquainted with the variations in average from year to year in the course of your work?

A. Yes. We make an estimate of what the average is and see whether a particular vessel is above or below that.

Q. In view of your experience in this field, would you be qualified to estimate the average catch

(Testimony of Hervey Petrich.)

in an average year for a tuna clipper approximately 80' long?

A. Yes. Going back over our records, we can.

Q. Have you had occasion to study your records recently in that respect?

A. I have, yes.

Q. Will you state to the Court what the approximate average catch of an 80' tuna clipper in an average [230] year would be in terms of tonnage?

A. In the average catch of an 80' bait boat or clipper, as you call them, we are assuming that—the carrying capacity is what we base it on, of course—now, you are speaking of 80'—however, that average run of vessel would run between 300 to 500 tons per year.

Q. Now, when you say you are referring to the capacity rather than to overall length, you mean the carrying capacity or the hold space of the vessel?

A. The amount of tuna that vessel can carry.

Q. What is the average carrying space of a tuna clipper approximately 80' over-all length?

A. The average would be between 90 and 120 tons on 80'. They normally have them up to 95', and that brings them up to about 150 tons' capacity.

Q. Now, when you speak of an average capacity of 90 to 120 tons, are you referring to weight or to cubic space?

A. I am referring to weight of the tuna that is unloaded.

(Testimony of Hervey Petrich.)

Q. Does that compare with cubic space? That is the normal cubic space ton of 40 cubic feet?

A. Well, normally, if we take a particular size of tuna, the average runs around 40 cubic feet for one ton.

Q. Forty cubic feet for one ton? [231]

A. That is right. That can vary with the size of the fish and how they pack it. It is just a rule of thumb figure.

Q. Assuming that a vessel had approximately cubic tonnage of 60 to 70 feet then, the catch would be smaller than for the vessel which you have described, would it not?

A. Yes. I would say that vessel would average around the lower levels of around 300 tons for the year, say 250 to 300 tons. These are just estimates, going by past experience.

Q. What type of fish are those?

Q. Yellow fin and skip jack, which is a species of tuna. On the market they are known as light meat tuna.

Q. Is there a fairly established price for yellow fin to the tuna vessel?

A. That is always established before they start.

Q. Does it vary from year to year?

A. Yes.

Q. Over an average period of say the last three years, what is the average price of yellow fin so far as you can recall it?

A. The average price of yellow fin is around \$320.00 a ton. However, we catch so much skip jack,

(Testimony of Hervey Petrich.)

and that is a lower price—\$280.00—so I would say the average for the two species as tuna would be around \$300.00 [232] a ton for the last two to three years.

Q. Do you happen to know what the price is this year?

A. Well, the price this year started out at \$350.00 a ton and a threatened tie-up resulted because they were getting so much tuna and so much tuna was being imported from Japan, that they agreed to reduce the price from \$350.00 on yellow fin to \$330.00. However, the year previous the price was \$320.00. [233]

* * * * *

Q. A moment ago, Mr. Petrich, it was pointed out to me that I inadvertently referred to 70' when I meant to say 70 tons. I was speaking of reduced tonnage capacity and you gave a lower estimate as to the average catch for a vessel of that smaller content. I now call that to your attention and ask you whether your answer would have been the same had I said 70 tons instead of 70'?

A. I was keeping in mind tonnage rather than footage.

Q. Thank you. Has the catch this year been below or above average so far?

A. The run of tuna has been exceptionally good, [234] but the market has been very poor. That is, the canneries, due to this higher price, were unable to accept it, and they would delay the vessels being unloaded, and tell them to lay down and not bring

(Testimony of Hervey Petrich.)

in so much; we can't take it. As a result, I would say the over-all picture is about the same as far as tonnage is concerned.

Q. The same as the average of previous seasons?

A. Yes. [235]

* * * * *

Q. Will the witness advise the Court how the average price this year so far compares with the prices for previous years? [237]

A. The average price this year up to July 27 was higher than it has practically ever been in the industry.

Q. And since that time, how was the price running in comparison with previous years?

A. The price is about the same at the present-time.

Q. Can you advise the Court as to the relative percentage of skip jack and yellow fin brought in in a normal season by an average small clipper?

A. I would say that the skip jack usually is a little more than the yellow fin. Perhaps—I would say it may be a 60-40 ratio. Sixty per cent would be the skip jack and forty per cent would be the yellow fin tuna.

Mr. Crutcher: I have no other questions.

The Court: You may inquire and you may cross examine without waiving your objections to this line of inquiry. Before that, however, we shall have a short recess at this time.

(Recess.) [238]

* * * * *

(Testimony of Hervey Petrich.)

Cross Examination

Q. (By Mr. Carey): The tuna boats that you operate and with which you are familiar in your own operation, I gather from your description they are what are called live bait boats——

A. The ones I have referred to in this court have been on the live bait vessels. However, we do operate purse seiners, also.

Q. Well, that is in the salmon industry, isn't it?

A. That is in the tuna industry, also.

Q. Do they catch tuna with purse seine boats?

A. Yes.

Q. Well, are those the purse seine boats that come down from Alaska to fill in the season or do they build them for tuna fishing?

A. They are strictly vessels that are used in Southern California for tuna, but they did come from this part of the country.

Q. Now, the vessels that you have been speaking about are vessels that are built as tuna clippers for live bait fishing?

A. Of the five vessels we have in the bait fishing game, four of them were built as that, and one of them was a converted Navy tug. [239]

* * * * *

Q. Have you ever seen this Silver Spray?

A. No, sir. I haven't.

Q. You don't know what its capacity is or suitability for catching tuna?

A. I have never seen it.

(Testimony of Hervey Petrich.)

The Court: Give him the length. The length has been previously mentioned.

Mr. Carey: It will take me a moment——

The Court: It has been stated as 80', and here is a photograph of it.

(Photograph handed to witness.)

Witness: This vessel is no bait boat. This is a jig boat or trolling boat. Well, we are or [243] have been talking about bait boats.

Q. (By Mr. Carey): What you have been testifying about throughout were the regular tuna schooners built for the tuna service and you haven't been talking about jig fishing at all?

A. No.

The Court: Well, do you know what the tuna cargo capacity of this vessel is, this vessel as you see it reflected in that exhibit?

Witness: I could never tell how much that carried until I went in and looked at the hold and saw how big it was.

Mr. Crutcher: On that one point we will produce evidence of the approximate——

Mr. Carey: I prefer that my cross examination not be interrupted, Your Honor.

Q. (By Mr. Carey): Now, you are asked about average catches during different years. The average may be of use for statistical purposes after the season is over, but the average for last year would be of no use at all as a prediction of what will be done this year, would it?

A. Well, the year has proceeded far enough for

(Testimony of Hervey Petrich.)

me to determine that this year is as good as last year.

Q. About an average year? [244]

A. Yes.

Q. But all the evidence you have given on that subject contemplates a live bait boat of large capacity with a large crew of experienced men?

* * * * *

A. My testimony has been on the basis of a bait boat.

Q. Has no relation to a jig boat such as the photograph discloses? A. No, sir.

Mr. Carey: That is all.

The Court: Anything further?

Mr. Crutcher: Yes, Your Honor.

Redirect Examination

* * * * * [245]

Q. (By Mr. Crutcher): Was your testimony concerning tuna clippers of approximately 80' in length, the testimony referring to averages, directed to bait boats of approximately 80' in length?

A. Yes.

Q. You referred in your testimony for Mr. Carey to a jig boat, did you not?

The Court: He did at one time when he was talking about that picture that was shown him, which is an exhibit in the case.

Q. Is there a difference between a jig boat and [246] a clipper? A. Yes.

Q. Is a jig boat ever referred to as a clipper?

(Testimony of Hervey Petrich.)

A. I have never heard of any jig boat being called a clipper.

Q. What is the essential difference between a jig boat and a clipper?

A. A jig boat can be used in very small vessels, and they troll like they troll for salmon. They draw a lure through the water. The poles are indicated. They have lures hanging from these just like a salmon troller. A bait boat is one that has circulating salt water and tanks with live bait, little bait in them kept alive.

Mr. Crutcher: I have no other questions.

Mr. Carey: At this time, Your Honor, I move to strike out, without any disrespect to the witness, all of his evidence for the reason that, according to his own admission, he has not testified to any such operation as we are dealing with here.

(Argument.)

Q. (By Mr. Crutcher): How many crew members are customarily employed on a jig boat?

A. Well, normally, a jig boat would have perhaps three men, two to three men, maybe four. [247]

Mr. Crutcher: I have no other questions.

Mr. Carey: I renew my motion.

The Court: The motion is denied with leave to renew it at the end of all of the testimony and after the close of all of the testimony on behalf of all litigants in the case.

You may step down.

(Witness excused.)

Call the next witness. We will swear the next witness after which we will take a recess until 1:45.

WILLIAM BARQUIST

called as a witness by and on his own behalf, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Armstrong): Will you state your name, please?

A. William Barquist.

The Court: Is this witness called on behalf of the intervening libelant Barquist?

Mr. Armstrong: Yes. This is the intervening libelant Barquist. [248]

Q. (By Mr. Armstrong:) Where do you reside, Mr. Barquist?

A. Black Diamond, Washington.

Q. Do you have a street address there?

A. Box 342, Black Diamond, Washington.

* * * * *

Q. What capacity were you in in the Navy?

A. I was a seaman first class.

Q. On what type of vessel?

A. I was on several different types of vessels. [249] I was on a seagoing tug and I was in Navy gun crews on merchant vessels, and I served a little bit aboard a submarine tender.

Q. Did you have any experience in the operation of any of these boats while you were on board them?

A. Not in the operation of the boats. My duties

(Testimony of William Barquist.)

were gunnery. I took care of guns, maintained them and manned them if it was necessary.

Q. You did not have experience as a navigator or as a helmsman prior to your going on board the Silver Spray? A. No, I didn't.

The Court: At this time those connected with this case are excused until 1:45 o'clock this afternoon.

(At 11:45 o'clock a.m., Thursday, September 16, 1954, proceedings recessed until 1:45 o'clock p.m., Thursday, September 16, 1954.)

Seattle, Wash., Sept. 16, 1954, 1:45 o'clock p.m.

The Court: You may proceed.

Q. (By Mr. Armstrong): How did you first become acquainted with the vessel Silver Spray or Mr. Tobin? [250]

A. Through an ad in the Seattle Times. * * * * *

Q. Where did you first meet with Mr. Tobin?

A. On board the Silver Spray. * * * * *

Q. Will you tell the Court what representations were made to you about the vessel on that occasion?

A. Well, Mr. Tobin told me it was a very good, seaworthy vessel and was practically fully equipped to go tuna fishing down in San Diego, for the Van Kamp's outfit down there, and he also said they had airplane spotters to go out and spot the fish, and all we would have to do is go out and catch them, and that we would be equipped with refrigeration and bait tanks when we got to San Diego. [251]

(Testimony of William Barquist.)

Q. Did you pay him any money to obtain a working share in this vessel?

A. Not at that date.

Q. Did you at any date?

A. I did. I believe it was about the 8th of May. I give him a bank draft of \$500.00 to hold my job on the tuna clipper.

Q. How much did you eventually pay him in full?

A. When I went aboard on Tuesday, May 11th, I paid him the other \$2000.00, which totaled \$2500.00.

Q. You first went on board to work on May 11, 1954?

A. Yes.

Q. Did you move your gear and personal effects on board the vessel at that time?

A. Yes.

Q. What work did you perform prior to the time the vessel left for Alaska?

A. Well, I worked on general deck work around there, painting, cleaning up, and all sorts of things that were supposed to be done. * * * * *

Q. Was Mr. Tobin present on board during any of this period of time? [252]

A. Yes, he was there occasionally.

Q. Did he tell you at or prior to the time you signed the contract who the master of the vessel was going to be?

A. He said that he was the master and the operator and the owner. * * * * *

Q. Did he advise you as to whether there would be any people on board the vessel who were experienced tuna fishermen?

(Testimony of William Barquist.)

A. Yes, he did. There were supposed to be two experienced tuna fishermen on board or coming aboard.

Q. Did he tell you when they were going to come on board?

A. No, he didn't, but that would be before we sailed.

Q. Did you depart with the vessel to Ketchikan?

A. Yes.

Q. Was the date you left May 18th?

A. May 18th, yes.

Q. Were you requested by Mr. Tobin or any one else in charge of the vessel to consent to this voyage to Alaska? [253]

A. No, I wasn't.

Q. What occurred? How did it occur that the vessel departed for Alaska and how did you find out about it and what did you do?

A. Well, shortly before they left, Tobin said: "We are going to Alaska," and I asked him what happened to the tuna fishing trip, and that was all there was to it. We just went to Alaska. I didn't have any say about it.

Q. What services did you perform when the vessel went to Alaska?

A. I stood wheel watches and worked aboard the vessel. * * * * *

Q. What occurred at Wrangell?

A. Well, we got there about 5:30 on Sunday morning, May 23rd, I think it was, and Ed Peecher and I went up town for a cup of coffee, found a little restaurant open [254] and there was a fellow in there, and we got talking about it. He asked if

(Testimony of William Barquist.)

we come in on this vessel, and we said we did, and we told him we come up to get a load of shrimp, and we asked him if he knew anything about it. He said he knew the people that owned and operated that cold storage plant, or whatever they call it, that had the shrimp, and this man said he would call up the owner and have him come down to the vessel. Well, about an hour or so he came down to the vessel, and he informed us there was no shrimp there for us, and that he had called Seattle and said there wouldn't be no use sending a boat up for shrimp, and after he looked our boat over he said, why, we couldn't haul shrimp any way because we didn't have any refrigeration on it. * * * * * [255]

Q. When did you first discover that Mr. Tobin was not returning with the vessel to Seattle?

A. Oh, that was shortly after we got back to Ketchikan.

Q. Who informed you of this fact?

A. Well, no one in particular. I just heard that kind of via the talk around the boat.

Q. Did any one advise you as to any reason why he was not going back to Seattle with you on board the vessel?

A. No. * * * * * [256]

Q. Will you tell us approximately the date of your arrival in Seattle?

A. I think it was June 3rd. * * * * *

Q. Were you on board the vessel on June 4th?

A. No, I don't believe I was, because Capt. Moore told me I might just as well go ahead and go home for a couple of days because he didn't think

(Testimony of William Barquist.)

there would be anything doing aboard the vessel.

Q. When did you return to the vessel?

A. I came down there the 5th, that was Saturday I believe, and there wasn't anything doing or no one around, [257] so I went home.

Q. Do you know whether or not on the 5th Mr. Tobin's gear was on board the boat?

A. I don't believe it was. In fact——

Q. Do you know? A. No, I don't know.

Q. Did you have occasion at any time between the 5th and the 7th to discover whether or not Mr. Tobin's gear was on board the vessel?

A. Well, I know when I took my gear off the vessel all the gear of everybody was gone.

Q. When did you take your gear off the vessel?

A. I believe that was a Sunday, June 6th.

* * * * * [258]

Q. What was the status of the supply of food and fuel, if you know, on board the vessel when it arrived from Ketchikan on the 3rd?

A. I can't say anything in regard to the fuel but I can say there was practically no food on board.

Q. Will you tell us what occurred on the 7th of June, 1954?

A. Well, my wife and I came down and we came aboard the vessel about 8:30 or 9:00 o'clock in the morning and stuck around there. Somebody said that Tobin was supposed to be there that day, and we stuck around all day long, and he didn't show up, but along about in the evening, about 7:00 o'clock I would say, he showed up.

(Testimony of William Barquist.)

Q. Did he come on board the vessel?

A. Yes.

Q. Will you tell us what Mr. Tobin said about the vessel when he came on board on the evening of the 7th?

A. Well, when Mr. Tobin came on board, I said: "What are we going to do now?" And he says: "Go up to my attorney and get your money."

Q. Who were the other people who were present at that time?

A. Well, there was my wife and myself, and Jim Gehrig was there, Don Moore, Mr. Peecher, and I think John Kadlec was there and George Helwig, the engineer. I can't [259] think of any more.

Q. Was Mr. Bunker or Mr. Herning there?

A. Mr. Herning was there throughout the day but he wasn't there that night, that evening.

Q. Did you go with Mr. Tobin to see his attorney?

A. Yes.

Q. Who else went with him?

A. My wife, Jim Gehrig, Don Moore, and I believe this is about all. Oh, Doss Payne, Doss Payne, he went, too.

Q. Who went into Mr. Swontkoski's office?

A. My wife, myself, and Mr. Gehrig.

Q. Did Mr. Tobin go into Mr. Swontkoski's office?

A. Yes.

Q. The four of you are the only ones that went in, as far as you know?

A. Yes.

Q. What was the subject of that conversation?

A. Well, we came out there because we were told

(Testimony of William Barquist.)

by Tobin we would get some money out there, but there wasn't any mention of anybody getting any money. About all that was said by Swontkoski, or whatever you call him, was that our contracts are legal and binding both ways, and that is about all my wife and I had anything to do with.

Q. When did you leave the vessel then?

A. You mean for good, to get off? [260]

Q. Yes.

A. I was back again the 8th, and I never went back any more after that.

Q. Were you ever advised after the vessel returned to Seattle that it was intended that the vessel would go tuna fishing, and when?

A. I was never advised of anything like that, but I was ready to go if it was going. * * * * * [261]

Mr. Armstrong: You may examine. [262]

Cross Examination

Q. (By Mr. Collins): Mr. Barquist, when you went to see Mr. Swontkoski you went for the purpose of trying to get back your original investment?

A. No.

Q. Did you not go to see Mr. Swontkoski to get back your original investment in the Silver Spray?

A. No.

Q. What did you go to see him about?

A. Mr. Tobin told us to come out there and we would get money. He didn't say what kind of money it was.

Q. What kind of money did you expect to get?

(Testimony of William Barquist.)

A. Well, what I expected and I think I was entitled to was money for fishing that we were supposed to do and didn't do. After all, Tobin told me when I went aboard the Silver Spray that I would make anywhere from \$7500.00 to \$12,000.00 a year, and I think I should be entitled to some of that had we gone fishing as we were supposed to.

Q. What exactly was the conversation between you and Mr. Swontkoski?

A. Well, there was very little said, because Mr. Swontkoski, he said that—about all he said was that the contract was legal and binding and there was no money to get. [263]

Q. Well, what did you say?

A. I didn't say anything. There wasn't anything to say. * * * * *

Q. Did you want your \$2500.00 back?

A. I didn't ask him for it. [264]

Q. Is that what you wanted?

A. Well, I wanted some money because I needed money. I didn't ask him for \$2500.00.

Q. But that is exactly what you wanted, your \$2500.00 back?

A. I didn't ask him for it.

Q. Is it not true that you went out to see Mr. Swontkoski to get your \$2500.00 back?

A. Well, I went out there to get money if there was any money to be had, any kind of money.

Q. You wanted your initial investment repaid, did you not?

A. I suppose if he offered it to me I probably

(Testimony of William Barquist.)

would have taken it, but the damage was done——

Q. Then that was the sole purpose of your visit to Mr. Swontkoski's office, was it not?

A. Well, I can't say it was.

Q. Did you and Mr. Swontkoski discuss prospective fishing shares in the future? A. No.

Q. You made no demand upon Mr. Swontkoski but for future fishing shares, did you?

Witness: Will you please repeat that?

(Last question is read by the reporter.)

A. No, I didn't make any demand. * * * * *

Q. You did not expect to be paid for work on the voyage to Alaska, did you?

A. Well, we went to Alaska with the intentions of making some money as far as I was told.

Q. That was later on, was it not? You expected to make money tuna fishing in California after the vessel returned to Seattle, is that right?

A. After the vessel returned to Seattle?

Q. Yes.

A. There was nothing said to me about the vessel ever going tuna fishing any more, not after my \$2500.00 was [266] invested or put in.

Q. You did sign one of these share contracts, did you not? A. Yes.

Q. Did you read it? A. Yes.

Q. Did you understand it?

A. I think I did. * * * * *

Q. Did you make any objection to the trip to Alaska?

(Testimony of William Barquist.)

A. If I would have a chance I would, but I didn't have a chance. * * * * * [267]

Q. You arrived in Seattle on June 3 about 5:30 in the morning? A. I think so. * * * * *

Q. Were you not told that you were permitted to leave the vessel for a few days while it was being drydocked for repairs?

A. Mr. Moore told me I might as well go home for a couple of days because there wouldn't be anything doing. * * * * * [268]

Q. Did you ever write to Mr. Tobin?

A. Yes. I wrote a letter to him once.

Q. To Spokane? A. Yes.

Q. Then you did know his address, didn't you?

A. Yes, but I had to trace it.

Q. When you wrote Mr. Tobin you demanded your money back, did you not?

A. Well, I was getting out of funds, and I needed money, and I wrote Mr. Tobin a nice letter asking him if he couldn't give me some money any way because I needed it.

Q. And in that letter didn't you say that you were aware that the contract provided for 90 days but wouldn't he please try to give you money immediately? * * * * * [269]

A. Yes, maybe I did.

Q. You don't deny that, do you?

A. Well, I may have. I am not going to deny it. * * * * * [270]

Q. Now, you went aboard again on June 6?

A. Yes.

(Testimony of William Barquist.)

Q. And took your belongings off? A. Yes.

Q. What prompted you to do that?

A. Well, it looked like there was nobody around the ship ever, so I took my belongings off so nobody would come and steal them.

Q. And still made no attempt to contact any one? A. No, I didn't. * * * * *

Q. What time of the day did you go aboard the vessel on June 7?

A. June 7? I believe it was around 8:00 o'clock [271] in the morning when I was there.

Q. Accompanied by Mrs. Barquist, were you?

A. Yes, sir. * * * * * [272]

Q. You say that Mr. Tobin showed up sometime during June 7?

A. About 7:00 o'clock in the evening.

Q. And at that time you were there; your wife was there, Gehrig, Moore, Peecher, Kadlec and Helwig, is that correct? A. Yes. * * * * * [273]

Q. What did Tobin say when he came aboard on the evening of June 7?

A. Well, he just came aboard, and I asked him: "What are we going to do now?" And he says: "Well, go out to my attorney and get your money." That is all he said to me. * * * * * [274]

Q. Now then, under what circumstances, when and where and who was present, if any one was present, did Mr. Tobin fire you?

A. There was nobody fired. Tobin just never showed up at the ship, and there was nothing there to eat and so there was nothing there to stay for.

(Testimony of William Barquist.)

Q. You have just testified that he came aboard on June 7th.

A. Well, he didn't stay there very long.

Q. Well, neither did you, right?

A. Well, I had to have something to eat.

Mr. Collins: No further questions.

Cross Examination

* * * * * [275]

Q. (By Mr. Carey): In what respect, Mr. Barquist, do you claim that Mr. Tobin misrepresented anything to you in connection with this proposed venture?

A. Well, when we discussed it before I bought in, why, he told me that we would make anywhere from \$7500.00 to \$12,000.00 a year fishing tuna. That is what sold me on the idea, and he also stated that: "All the contracts we have, we will lay them up here on the table where everybody can study them and read them over and vote on them."

Q. Do you claim those were misrepresentations that you relied upon? Did you believe him, in other words?

A. Well, I don't know what else they could have been, because none of them was ever carried out.

Q. I am not asking about the carrying out end of it, but was it because of those representations he made to you that you advanced your \$2500.00?

A. Yes.

Q. And that is what you are complaining about?

A. Yes.

(Testimony of William Barquist.)

Mr. Carey: That is all.

The Court: You may step down. * * * * *

Mr. Wells: I will call Mr. Norman L. Bunker, on behalf of the libelant Bunker.

NORMAN L. BUNKER

called as a witness by and on his own behalf, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Wells): Please state your full name and spell your last name.

A. Norman L. Bunker. B-u-n-k-e-r.

Q. Where do you reside?

A. Seattle, Washington, 16232 14th Ave. N.E.

Q. What is your occupation?

A. I am a ship master.

Q. As a ship master, what license or licenses do you have?

A. I hold a license for steam or motor vessels of any gross tons for any oceans.

Q. Is that is what is commonly called an unlimited master's license? A. That is right. [279].

Q. Under such license, are you qualified to navigate a vessel such as the Silver Spray?

A. I am qualified to navigate the United States.
* * * * * [280]

Q. Would you say that it was some time within the first two weeks in May that you first met Mr. Tobin? A. I believe so.

Q. As a result of that conversation, did you see

(Testimony of Norman L. Bunker.)

the Silver Spray? A. Yes, I did. * * * * *

Q. In the course of that observance of the vessel, did you have an opportunity to observe its hold capacity? A. I did. * * * * * [281]

Q. What is the tonnage capacity of the hold?

A. The hold, as I stepped it off, was 2880 feet, which would be 72 tons at 40 cubic feet to the ton. * * * * * [282]

Q. Please tell the Court what was said by Mr. Tobin and by you with reference to employment of you aboard the vessel Silver Spray on June 2, 1954 in Mr. Tobin's room at the Edmond Meany Hotel.

A. Well, I told Mr. Tobin that I understood that he required a navigator aboard the vessel. He said he did. I asked him whether he would be willing to take me, and he said he would be glad to have me, as I recall, and we discussed various aspects of the venture. [283]

Q. What was the nature of the venture being discussed? A. Tuna fishing.

Q. Was it stated to you out of what port the tuna fishing venture would take place?

A. San Diego.

Q. Was it stated when that venture would commence?

A. I understood that the vessel was up in Alaska and was returning, and it would be back within a matter of almost hours, and I assumed that as soon as fuel and stores were taken on board, the vessel would leave. Mr. Tobin told me that the vessel had been gone for several days, weeks, rather, and that

(Testimony of Norman L. Bunker.)

he felt that the crew would appreciate having a couple of days ashore.

Q. Were any statements made to you with reference to the use of the vessel in the service of any particular fishery or cannery organization?

A. Yes. I was told that Mr. Tobin had a contract with Van Kamp's to fish tuna; that this was very good because Van Kamp's was going to provide an airplane which would help in the search of tuna.

Q. Have you ever had any commercial fishing experience? A. None.

Q. I want to ask you again, particularly, was there a statement made to you on June 2 at Mr. Tobin's hotel room [284] as to when the vessel would depart Seattle?

A. The impression that I received was that upon the arrival of the vessel, it was prepared to go fishing, other than the matter of giving the crew a couple of days of shore leave to visit their families. I myself was under the impression that it was only a matter of taking stores and fuel and we would depart.

Q. Were any statements made to you with reference to equipping the vessel with bait tanks or refrigeration?

A. Yes. I understood when the vessel arrived at San Diego the vessel would be fitted with bait tanks and with refrigeration.

Q. Who made those statements to you?

A. Mr. Tobin. * * * * * [285]

(Testimony of Norman L. Bunker.)

Q. During that period of time was the matter of return from your employment discussed?

A. Yes.

Q. What was said?

A. Mr. Tobin said that I could be assured of a good living, and my wife inquired as to what he considered a good living, and he replied from \$7500.00 up to some other figure, that I don't recall, the latter one.

Q. As a result of this conversation and your knowledge of the vessel, were you offered the position of navigator aboard this vessel?

A. I was.

Q. Did you accept the same? A. I did.

* * * * * [286]

Q. During the day following June 2, did you receive any instructions relative to your employment aboard the vessel Silver Spray?

A. On the evening of June 2 I was advised that the boat would be in the following day and that I should go down on that day, on the next day, and relieve Mr. Moore.

Q. Who gave you these instructions?

A. Mr. Tobin.

Q. That was on the 2nd?

A. That is on the evening of the 2nd, yes.

Q. Did you go to the Silver Spray?

A. The following day, late in the afternoon, [287] about 5:00 p.m., I went aboard the vessel.

Q. What did you do when you got aboard the vessel?

(Testimony of Norman L. Bunker.)

A. I went aboard for two reasons: One——

Q. What did you do when you got there?

A. I asked Mr. Moore to show me how some of the equipment that I was not familiar with operated, and I looked around the vessel to see what equipment was there and what equipment would be needed for the proposed trip.

Q. Are you talking particularly with reference to navigational equipment? A. That is true.

* * * * * [288]

Q. Were there any conversations with Capt. Moore or Mr. Gehrig relative to the movement of the vessel to drydock?

A. Yes. I suggested to Mr. Tobin and to Mr. Gehrig, as I recall—this was on a Friday, I believe—that rather than put the vessel in a drydock on a Saturday and Sunday and incur added expense, due to overtime for the mechanics, that we wait until Monday before drydocking.

Q. You made the suggestion to Mr. Tobin?

A. As I recall, the three of us discussed it.

Q. In the hotel room or where?

A. At about 8:00 or 9:00 o'clock in the evening in the Edmond Meany Hotel, Mr. Tobin, Mr. Gehrig and myself became aware that the vessel had had an accident, and—— * * * * * [289]

Q. Were you so advised by Mr. Gehrig on this occasion when you and he and Capt. Moore were discussing this, were you so advised by Mr. Gehrig that you could return home? A. Yes.

Q. And did he also at that time advise you he

(Testimony of Norman L. Bunker.)

would call you when your special services were needed? A. Yes.

Q. Did you return to your home? A. I did.

Q. Did he subsequently call you?

A. Not that I recall.

Q. Did you attempt to call him?

A. On many occasions.

Q. Did you succeed in reaching him?

A. Eventually.

Q. When was that, the day, sir?

A. I believe that was about June 10.

Q. What was said by Mr. Gehrig to you on that occasion?

A. Mr. Gehrig told me that the vessel had been attached; that he was no longer the representative for Mr. Tobin; that Mr. Tobin was represented by Mr. Swontkoski.

Q. Have you seen Mr. Tobin between June 2nd or 3rd [291] and now until he arrived in the court room? A. No.

Q. Did you go and see Mr. Swontkoski?

A. I did.

Q. What did Mr. Swontkoski say to you?

A. He told me Mr. and Mrs. Lower had placed a lien on the vessel, and I asked Mr. Swontkoski if Mr. Tobin was going to lift the lien.

Q. Did he respond to that question?

A. To that particular question I don't recall; I don't recall what he said in response.

Q. On June 3 and the days following, did you

(Testimony of Norman L. Bunker.)

regard yourself in the employ of the vessel Silver Spray? A. I did.

Q. Did you hold yourself available to serve aboard her whenever ordered and requested to do so? A. I did. * * * * * [292]

Mr. Wells: That is all the questions I have.

Cross Examination

Q. (By Mr. Collins): Mr. Bunker, as far as you know then, on June 2nd Mr. Tobin had every intention of taking the Silver Spray tuna fishing?

A. That is correct.

Q. Did you discuss jig fishing as well as live bait fishing?

A. Frankly, I wouldn't know what jig fishing was. We discussed live bait.

Q. Didn't you get the impression that Mr. Tobin didn't know anything about tuna fishing?

A. Mr. Tobin told me that he had fished salmon for [295] several years and that he had been making a study of the life habits of tuna fish.

Q. Well, isn't it true then that both of you were more or less groping on a new and untried venture?

A. I believe the trade name is we were both green beans.

Q. You did sign one of these fishing contracts?

A. That is true.

Q. And you understood the purport of the contract? A. That is true.

(Testimony of Norman L. Bunker.)

Q. For what reason did you call Mr. Swontkoski?

A. I called on Mr. Swontkoski to endeavor to find out what Mr. Tobin was going to do to lift the lien.

Q. Did you discuss the \$1500.00 you paid Mr. Tobin?

A. I think at the termination of the conversation I told Mr. Swontkoski to consider this as a formal request for the return of the \$1500.00.

The Court: Will you state how much money in all you paid on account of this transaction?

Witness: I gave a check for \$1500.00 and a promissory note payable within 90 days for \$1000.00.

Q. (By Mr. Collins): You have never been actually fired by Mr. Tobin?

A. No. I have been abandoned by Mr. Tobin.

Mr. Collins: I have no further questions.

* * * * * [296]

Cross Examination

Q. (By Mr. Carey): How long have you been a seafaring man? A. 27 years.

Q. Without going into all the details, I assume you started in as deck hand and worked up to master? A. As deck boy, yes.

Q. With unlimited license?

A. Yes, that is right.

Q. And while you have never been on a fishing expedition, your experience in seafaring affairs has

(Testimony of Norman L. Bunker.)

enabled you to know that fishing is an uncertain enterprise, isn't that correct?

A. Yes, an element of chance.

Q. That nobody in, say, the month of April or May or June of any one year can tell or predict or prophesy [297] how many fish are going to run in July, August or September?

A. I believe they can average it out.

Q. Why do you think so?

A. Fish that are caught are a matter of record, and you can average out any record.

Q. Is it your idea that a man who has had no more fishing experience than Mr. Tobin could predict what the catch of tuna would be in any given year?

A. I believe so if he made a study of tuna; he should be able to tell you what you would make in a given year. The statistics should be there.

Q. Did you believe his prediction?

A. I believed him.

Q. And as result of that, was that the reason you put your money up? A. Yes.

Q. And do you think he misled you, deceived you?

A. He deceived me in some respects, yes.

Q. And that is what you are complaining about?

A. No.

Q. What are you complaining about?

A. I am complaining about the fact that Mr. Tobin wrongfully discharged me or abandoned me, and I am now seeking redress for that. * * * * *

(Testimony of Norman L. Bunker.)

Q. During that 13 days, had you performed any services aboard the boat as navigator?

A. Yes.

Q. What?

A. I observed the equipment of the vessel. I saw what was needed in the way of periodicals, charts, equipment, chronometers, tide tables, parallel rulers, dividers, etc. [301]

Q. And how long did that take you?

A. Took me about a matter of an hour and a half to two hours.

Mr. Carey: That is all. * * * * * [302]

JOHN KADLEC

called as a witness by and on his own behalf, having been previously sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Crutcher): Your name is John Kadlec?

A. Yes.

Q. And you have previously testified in this case?

A. Yes.

Q. Mr. Kadlec, you have previously testified as to the circumstances of your meeting the respondent and as to your employment aboard the vessel Silver Spray. Would you advise the Court as to the date when you left the Silver Spray, that is the last day you reported aboard her?

A. June 4.

Q. Have you received any compensation from Mr. Tobin or from his agent or from the master

(Testimony of John Kadlec.)

for the work which you performed aboard the Silver Spray?

A. Just the \$5.00 I received in Ketchikan.

Q. That was the \$5.00 to which you previously testified?

A. Yes.

Mr. Crutcher: I have no further questions. [305]

I wish to introduce on behalf of Mr. Kadlec the testimony which he previously gave in support of the Lower case, and I wish to now move to amend the libel of Mr. Kadlec to conform to the proof, and I wish Mr. Collins to be permitted to cross examine upon that issue, that is, the issue presented by the pleadings, without reference to the scope of the direct examination which has just been made.

Mr. Collins: Your Honor, I make the objection because it is absolutely contrary and different than Mr. Kadlec's initial libel.

(Argument.)

The Court: The objection is overruled. The motion for such trial amendment is granted, and you may cross examine the witness further if you wish.

Cross Examination

Q. (By Mr. Collins): Mr. Kadlec, you did not sign a share agreement on the Silver Spray, is that correct?

A. That is correct.

Q. You negotiated with Mr. Tobin for a share in the Sockeye, is that correct?

A. On the Sockeye and/or the tuna boat.

Q. Well, you signed an agreement with Mr. Tobin [306] on the Sockeye, did you not?

(Testimony of John Kadlec.)

A. I signed on both of them, sir.

The Clerk: Respondents' Exhibit A-10.

(Contract (Kadlec) marked Respondents' Exhibit A-10 for identification.)

Q. (By Mr. Collins): You have before you a typewritten document dated April 14th and marked for identification as Respondents' Exhibit A-10. Is that your signature on that document?

A. Yes.

Mr. Collins: I offer it in evidence.

Mr. Crutcher: No objection.

The Court: Admitted.

(Respondents' Exhibit A-10 received in evidence.)

Q. (By Mr. Collins): Now referring to the document, Mr. Kadlec, does it not say you are purchasing a share on the Sockeye?

A. On the Sockeye or a tuna boat.

Q. Will you kindly read the language?

A. (Reading) "In consideration of the sum of \$1500 - \$500 dn. paid by the second party the first party [307] agrees to sell one working share in the fishing boat Sockeye or tuna Boat, owned by the first party."

Q. At that time you did not have any operational interest in the Silver Spray, did you?

A. Just Mr. Tobin's word.

Q. Mr. Tobin did not own the Silver Spray as of April 14, did he?

(Testimony of John Kadlec.)

A. He was planning on purchasing this boat.

Q. You did some work on the Sockeye, did you not? A. A little off and on.

Q. Well, how much did you do?

A. It wouldn't amount to much. I don't know exactly how much it was, probably an hour or so.

Q. Under what circumstances do you claim Mr. Tobin promised to pay you \$100.00 a week on the Silver Spray?

A. Mr. Tobin promised me if I went on the tuna boat, Silver Spray, that I would work for \$100.00 a week.

Q. When was that?

A. On April 14th.

Q. Was any one present? A. No.

Q. Did you tell any one that you claimed wages on the Silver Spray?

A. I told Mr. Swontkoski.

Q. Later on, after the Silver Spray came back, you [308] went out and talked to Mr. Swontkoski, is that right? A. Yes.

Q. Did you then claim that Mr. Tobin owed you \$100.00 a week on the Silver Spray?

A. I told Mr. Swontkoski the words in effect—we talked about the wages of my previous employment, based on a five day week.

Q. Is not this the fact: That you told Mr. Swontkoski that you were entitled to only \$150.00 for wages for your work on the Sockeye, and that you were entitled to your \$500.00 back from Mr. Tobin which you invested in the Sockeye? A. No.

(Testimony of John Kadlec.)

Q. And you had no conversation with any one concerning this so called wage agreement?

A. I don't follow you, sir. Who are you talking about?

Q. I say you had no conversation on board about the so called wage agreement? A. No.

Q. Why didn't you tell your lawyer then when you intervened in this case?

A. I didn't feel it was necessary, sir.

Q. Do you mean to say you thought you were under a wage contract with Mr. Tobin, and at the time you intervened in this action it was unnecessary to tell your lawyer about it? [309]

A. Yes.

Q. That was Mr. Wells, was it not?

A. Yes.

Q. And with your consent, Mr. Wells formally withdrew as your counsel?

A. No, it wasn't that, sir. I don't know why Mr. Wells withdrew.

Q. I am not asking you for any conversation with Mr. Wells because they are privileged. I would like to know, though, how it was that if you had a binding wage contract with Mr. Tobin that you did not tell your lawyer about it for the purposes of this suit and brought it up in the last few days for the first time.

Mr. Crutcher: I object to that statement for the reasons it is not a question and counsel is obviously attempting to elicit a confidence between client and attorney.

(Testimony of John Kadlec.)

The Court: The objection is sustained.

Mr. Collins: I have no further questions.

Cross Examination

Q. (By Mr. Carey): Mr. Kadlec, was it yesterday you were on the stand before?

A. Yes. [310]

* * * * *

Q. Isn't it a fact that yesterday you said you had no discussion with Tobin at all about going on the trip to Alaska? A. I didn't.

Q. If you had no discussion with Tobin about going to Alaska, how could it possibly be that you and he agreed on \$100.00 a week while on the trip to Alaska? [312]

A. I don't know that, sir. The fact is that I learned from the other men on board that we were going to Alaska.

Q. My question is if you had no discussion with Tobin about going on the trip to Alaska, how can it possibly be that you had an agreement with him to pay you \$100.00 a week while on that trip. Can you answer that?

A. Sir, I didn't care where the boat went as long as my wages went on.

Q. That is the only answer you can make, is it?

A. Yes.

Mr. Carey: That is all.

Redirect Examination

Q. (By Mr. Crutcher): Mr. Kadlec, when was

(Testimony of John Kadlec.)

the conversation with Mr. Tobin in which he mentioned the figure of \$100.00 a week for working on the Silver Spray?

A. At the Edmond Meany Hotel, April 14.

Q. At that time did Mr. Tobin tell you he owned the Silver Spray? A. Not at that time.

Q. At that time he told you he owned the Sock-eye? A. Yes.

Mr. Crutcher: I have no other questions. [313]

The Court: Step down.

(Witness excused.)

The Court: Call the next witness. [314]

* * * * *

Mr. Crutcher: At this time, may it please the Court, the intervening libelants and the libelant, who are crew members, rest their case in chief.

Mr. Carey: For the record, Your Honor, for the same reasons already stated, namely, the objection on the ground of lack of jurisdiction, I move to dismiss the original libel of Lower and all the intervening libels, other than the mortgagees, of course, upon the ground that whatever the pleadings may have been, the evidence now before the Court, and that is controlling, definitely shows that the only cause of action is one for deceit, not within the jurisdiction of the Admiralty Court.

The Court: The motion is denied.

Mr. Collins: Respondent Tobin now moves to dismiss all libels upon the ground that they do not state a cause of action against the vessel in partic-

ular or against Mr. Tobin personally in this particular proceeding. [315]

(Argument.)

The Court: The motions are denied with leave, in each instance, for their being renewed at the close of all the evidence.

(Discussion.)

The Court: The opportunity of proving the intervening libel of the intervenors Putnam and Overman, the mortgagees, is reserved to them until after the respondents' case in chief, and Mr. Carey is permitted, therefore, to produce their case out of order in that manner.

You may proceed with the respondents' case in chief.

Mr. Collins: I will call Mr. Swontkoski.

JOSEPH F. SWONTKOSKI

called as a witness by and on behalf of respondents, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Collins): Your full name, please?

A. Joseph F. Swontkoski—S-w-o-n-t-k-o-s-k-i.

Q. Your profession, please?

A. I am an attorney at law.

Q. At one time did you represent Mr. Tobin in connection with the Silver Spray? A. I did.

Q. Are you willing to waive the privilege of communication between attorney and client?

A. Yes.

(Testimony of Joseph F. Swontkoski.)

The Court: Is the client also willing?

Mr. Collins: I think Mr. Tobin should be sworn so I may ask him that one question.

The Court: You may rise and be sworn.

ROBERT J. TOBIN

called as a witness by and on his own behalf, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Collins): Mr. Tobin, do you understand that conversations between an attorney and his client are privileged unless waived by the client?

A. Yes. [317]

* * * * *

Q. You are willing to waive your privilege as to any conversations or discussions? A. Yes.

Mr. Collins: That is all.

(Witness excused.)

JOSEPH F. SWONTKOSKI

called as a witness by and on behalf of respondents, having been previously sworn, was examined and testified further as follows:

Direct Examination—(Continued)

Q. (By Mr. Collins): Did you have occasion to talk with Mr. Kadlec? A. Yes, sir. [318]

* * * * *

(Testimony of Joseph F. Swontkoski.)

Q. What was the conversation?

A. My best recollection is that Mr. Kadlec came to [319] my office and inquired whether he could get his money for wages from Mr. Tobin. I asked him how much the wages were and he said \$150.00, about three weeks' wages due. My recollection further is that this did not relate to the Silver Spray. I was at that time aware of the matter of the Sockeye, having discussed it with Mr. Tobin who was then my client, and I could not then advise him whether or not he would be paid, but he was then willing to waive his claim of \$500.00 on the Sockeye in payment for \$150.00. That is my best recollection. He informed me that he then had an attorney, at which point I ceased discussing the matter with him.

Q. Did you then inform Mr. Tobin of that conversation?

A. I wrote him a letter recounting what had happened since the last time I saw him. It would be the next day, as a matter of fact.

Q. Did Mr. Kadlec make any claim with respect to the Silver Spray at all?

A. Not to my recollection, sir.

Mr. Collins: You may examine.

Cross Examination

Q. (By Mr. Crutcher): Mr. Swontkoski, in this conversation with Mr. Kadlec, you say that the discussion of wages related solely to the Sockeye, is that correct? [320]

(Testimony of Joseph F. Swontkoski.)

A. Yes, sir, that is my best recollection of it.

Q. There was no discussion at that time as to any claim which he might have for wages on the Silver Spray?

A. No, sir.

* * * * *

Q. What did you do further with respect to the wage claim which Mr. Kadlec gave you of \$150.00 on the [321] Sockeye? You referred it to Mr. Tobin, I believe you said. Did you thereafter take any action with respect to that claim?

A. No, sir. I merely advised my client as to what had taken place, as to his rights. In other words, this letter that I referred to was an extensive letter on the whole discussion of his fishing venture, just brought him up to date. I mentioned that in one of the paragraphs.

Mr. Crutcher: I have no other questions.

Mr. Collins: No further questions.

The Court: Step down.

(Witness excused.)

ROBERT J. TOBIN

called as a witness by and on his own behalf, having been previously sworn, was examined and testified further as follows: * * * * * [322]

Direct Examination—(Continued)

Q. (By Mr. Collins): Your name is Robert J. Tobin?

A. Yes.

Q. Where do you live, Mr. Tobin?

A. 3717 East Cleveland, Spokane, Washington.

Q. How long have you lived in Spokane?

(Testimony of Robert J. Tobin.)

A. Over a year.

Q. Prior to your participation in the Silver Spray, what was your occupation?

A. I was working on the railroad.

Q. At what wage?

A. Approximately \$500.00 a month. [323]

* * * * *

Q. When did you come in contact with the Silver Spray?

A. It was at Fisherman's Wharf. I was there with a Jack Flagler who has a commercial boat company I believe, and Mr. Overman come up and asked Mr. Flagler if the charter had come through on the boat. They were anticipating some kind of a charter or something, and Mr. Overman invited me over to see a nice boat. When I seen the boat, I was thrilled with the boat. I mean it was something, and we talked further on it, met further on it, and we came to a written agreement, giving the lien I had in the Sockeye as security until I got hold of \$5,000.00, and then title would be turned over to me or a mortgage. [324]

* * * * *

Q. How long prior to April 28 did you first start to negotiate with Putnam and Overman?

A. I don't recall. It was a few days before. It was either one or two days before the signing of the purchase agreement.

Q. How long before the mortgage was the purchase agreement?

A. A couple of weeks, three weeks I guess. I

(Testimony of Robert J. Tobin.)

had until June 1st to get the mortgage, but I picked it up and got it cleared with the money I received from the shareholders.* * * * * [325]

Q. When did you come in contact with Kadlec?

A. Mr. Kadlec answered—I was trying to—endeavoring to get shareholders for a trolling boat. Mr. Kadlec answered an ad in regards to that in which he wanted to go aboard it as an investment.

Q. To which vessel did that pertain?

A. The Sockeye.

Q. Did Mr. Kadlec pay you money?

A. Yes, \$500.00.

Q. What is your response to his wage claim on the Silver Spray?

A. He has no wage claim. There was no wage agreement whatsoever. As a matter of fact——

Q. Did you have any discussion with Mr. Kadlec about the Alaska voyage?

A. Yes, I believe I did. I don't know what it was though. There were so many discussions. I don't know at this time. He was in full knowledge that we were going to [326] Alaska to take this cruise.

Q. What was his attitude about going?

A. Wonderful. * * * * *

Q. How did you get in contact with Mr. Bunker?

A. Mr. Bunker answered the same ad in regards to Alaska fishing, and consequently the talk I had with him that—now, I could be wrong. I don't know, but I believe he answered the ad in regards to Alaska fishing, and I told him of my inexperience and I needed a master.

(Testimony of Robert J. Tobin.)

Q. Just a moment. When did you contact Mr. Bunker? * * * * * [327]

A. June 2, I believe. * * * * * [328]

Q. How was the meeting arranged?

A. Through Mr. Gehrig. * * * * *

Q. What did you talk about?

A. We talked about the tuna venture, about the possibilities of the boat coming back later and used for an excursion boat in Alaska, which would be a more sound basis for a livelihood out of it.

Q. What did you tell him of your fishing experience? * * * * *

A. I told him I had one year trolling experience, or one season, in Alaska.

Q. Did you discuss the terms of the contract in detail? [329]

A. Yes, sir. * * * * * [330]

Q. Did you talk about the risks of tuna fishing?

A. Yes, sir, we did.

Q. What did you say and what did he say?

A. My conversation was that it was a gamble. Mr. Bunker's conversation was this: He said: "I am reckless with my own money, but I am very careful with other people's money," and he said: "I like to gamble."

Q. Did you discuss the Van Kamp Company?

A. What I knew of it.

Q. What did you and Mr. Bunker talk about with respect to the Van Kamp Company?

A. With respect to selling our fish to Van Kamp.

Q. Did you tell him you had a contract with Van Kamp?

(Testimony of Robert J. Tobin.)

A. No, sir, I didn't.

Q. Did you have a contract with Van Kamp?

A. No, sir, I didn't.

Q. How did you hear about the Van Kamp Company?

A. From booklets on the boat, which they took one themselves. * * * * * [331]

Q. How did you get in contact with Mr. Herning?

A. He answered an ad in regards to tuna fishing.

Q. Will you take out Mr. Herning's contract?

A. I have it here.

Q. What is the date of that?

A. 27th day of April.

Q. With respect to that date, when did you first see Mr. Herning?

A. I believe it was two days before. * * * * *

Q. Did you talk to Mr. Herning on board the Silver Spray?

A. Yes, I did.

Q. About two days before April 27?

A. Yes.

Q. Did you discuss tuna fishing?

A. Yes.

Q. What did you tell him about your proposed venture, and what did he tell you?

A. I told him, explained to him, that I had just gotten, had just bought the boat, that I knew nothing about [333] the boat. It was the biggest boat I had ever been on in my life. I knew nothing about diesel engines. He said he knew diesel engines and told me of his experiences in Alaska fishing, and I was very impressed by Mr. Herning because I be-

(Testimony of Robert J. Tobin.)

lieved he had a lot of knowledge that would help me in a venture I knew nothing about. * * * * *

The Court: We will have to continue proceedings until tomorrow morning. The Court is adjourned until tomorrow morning at 10:00 o'clock.

(At 4:30 o'clock p.m., Thursday, September 16, 1954, proceedings recessed until 10:00 o'clock a.m., Friday, September 17, 1954.) [334]

Seattle, Wash., Sept. 17, 1954, 10:00 o'clock, a.m.

The Court: You may proceed.

Q. (By Mr. Collins): Mr. Tobin, will you direct your attention to Mr. Herning's contract? Do you have it before you? A. Yes, sir.

Q. What is the date of it?

A. The 27th of April, 1954.

Q. Mr. Herning made the Alaska trip with you?

A. Yes, he did.

Q. Will you direct your attention to Mr. Peecher's contract? What is the date of that contract?

A. His is the 4th day of May, 1954.

Q. How did you come in contact with Mr. Peecher?

A. In response to an ad in the paper.

Q. Where did you meet him?

A. He came to the boat.

Q. How did you arrange the meeting?

A. I left a phone number at Fisherman's Wharf, Room 211.

Q. With reference to May 4, when did you first talk to Mr. Peecher? [335]

A. Several days before.

(Testimony of Robert J. Tobin.)

Q. Did you tell Mr. Peecher you were an expert tuna fisherman? A. No. * * * * *

Q. What did you and Mr. Peecher talk about on your first meeting?

A. As near as I recall, our conversation was in regard to the boat; if the boat wasn't successful fishing, we would use it for freight or charter. It had tremendous possibilities. Mr. Peecher told me that if we went into freight and that end, he knew how to handle all the lines, take care of all the cargo, and——

Q. What representations, if any, did you make to Mr. Peecher, regarding a contract with Van Kamp Company? A. None whatsoever.

Q. Did you talk about Van Kamp at all?

A. Yes, we talked about Van Kamp.

Q. What was the conversation?

A. Well, I hoped to fish for Van Kamp. * * * * *

The Court: If in doing so, you are stating the substance of what you said and what he said.

A. Well, there were varied discussions. One was Van Kamp. One was Honolulu. Which would be the best fishing and the place to go.

Mr. Collins: Your Honor, this may be irregular but I think it is important. Due to the fact that the replies to Mr. Tobin's affirmative defenses which came in, the last one on the day previous to the trial, now allege fraud and misrepresentation by Mr. Tobin, I had Mr. George Bender, a certified public accountant, go through all of the Silver Spray vouchers. He has made a full accounting of

(Testimony of Robert J. Tobin.)

the receipts and disbursements of the funds paid him by the libelants. If in order, I would like to put Mr. Bender on the stand. * * * * * [337]

The Court: You may step down temporarily.

(Witness excused temporarily)

The Court: You may inquire of this witness up to the point where objection is made, and then I will hear the objection and give to the one making it the opportunity to state the objection.

The Clerk: Respondents' Exhibit A-11.

(Receipts and Disbursements marked Respondents' Exhibit A-11 for identification.)

GEORGE D. BENDER

called as a witness by and on behalf of respondents, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Collins): Your name, please.

A. George D. Bender.

Q. What is your profession, Mr. Bender?

A. Certified public accountant. * * * * *

Q. Mr. Bender, at my request, did you examine the vouchers pertaining to the expenditures on the Silver Spray? A. I did.

Q. Were you given the complete records of the Silver Spray, as far as you know?

A. As far as I know, it was complete, yes.

* * * * * [339]

(Testimony of George D. Bender.)

Q. (By Mr. Collins): You have before you, Mr. Bender, Respondents' Exhibit A-11 for identification. Will you identify that?

A. It is the report that I prepared. It is entitled "Receipts and Disbursements Statement, Robert J. Tobin, operating Silver Spray Fishing Vessel".

Q. Made in accordance with all of the vouchers which Mr. Tobin submitted to you and made in accordance with the information he gave you orally?

A. That is correct.

Mr. Collins: I offer Respondents' A-11.

Mr. Crutcher: We object to its admission. We see no relevance to this——

(Argument.) * * * * * [346]

The Court: You may, on voir dire, interrogate on that point as to whether or not the data in its original form submitted to him is voluminous or intricate or involved and hard to understand by a layman, matters of that sort.

Voir Dire Examination

Q. (By Mr. Crutcher): Mr. Bender, at the time you prepared this statement, did you have before you a systematic set of records of any sort?

A. I had just a little brown-backed memorandum book in which Mr. Tobin had listed the moneys received and paid out. It was in this file (indicating). I imagine it is still here.

The Court: That ought to be available for cross examination when that time comes.

(Testimony of George D. Bender.)

(Witness removes brown note book from file.)

The Court: Is that it?

Witness: Yes.

The Court: Is that the original record, the only original record, submitted to you?

Witness: That is correct.

The Court: Is there any objection to marking [347] it for identification?

Mr. Collins: No, Your Honor.

The Clerk: Respondents' Exhibit A-12.

(Brown Note Book marked Respondents' Exhibit A-12 for identification.) * * * * *

Q. (By Mr. Crutcher): Did you examine any cancelled checks? A. No.

Q. Did you examine any receipts from the vendees themselves?

A. Well, not other than the bills that are in the files here.

Q. How many of the items in your schedule of disbursements are supported by such vouchers?

A. Well, the majority of the items in there. I [348] would say substantially all of them are supported by little cash register tickets or invoices, which I have here.

The Court: Well, bring them out, too. I want to bring out all of the original record sources submitted to you and considered by you when you were making up Respondents' Exhibit A-11.

(Witness hands pouch to Clerk.)

Q. (By Mr. Crutcher): While those are being marked for identification, did you in your capacity

(Testimony of George D. Bender.)

as a certified public accountant determine that the expenditures shown in this list were made for the purpose of operation of the Silver Spray?

A. They were all brought in to me with the explanation that those were the expenses for the Silver Spray, and I treated them as such.

Q. Will you answer the question? * * * * * [349]

A. No. I didn't have any way of determining whether they were Silver Spray or what they were.

Q. Did you make any inquiry of any person shown on this list as a payee as to whether he had received such a payment? A. No.

Q. Did you make any audit, in the customary sense of that term, whatsoever?

A. Not an audit. It was just merely a listing of Mr. Tobin's disbursements.

Q. This, then, is simply a summary of the disbursements as shown to you by Mr. Tobin?

A. That is correct.

Mr. Crutcher: I have no other questions.

* * * * * [350]

The Clerk: Respondents' Exhibit A-13.

(Folding Pouch marked Respondents' Exhibit A-13 for identification.)

The Court: The Court has before it Respondents' Exhibit A-13, which is a number of vouchers said by the witness to have been given to him—I am not sure he expressly said so—but A-13 was produced by the witness now on the stand in response to some question about where were the other source mate-

(Testimony of George D. Bender.)

rials. Further inquiry might be made on that point as to what these A-12 and A-13 are.

Mr. Crutcher: I believe he has said sufficient on that now to establish that A-11 prepared by Mr. Bender is nothing more than a list of matters provided to him by Mr. Tobin and as such has no evidentiary value in any court.

(Argument.)

The Court: The ruling is that the objection to Respondents' Exhibit A-11 is sustained. [351]

(Respondents' Exhibit A-11 rejected.)

Mr. Collins: May Mr. Bender be excused?

The Court: Mr. Bender may be excused.

(Witness excused.) * * * * *

ROBERT J. TOBIN

called as a witness by and on his own behalf, having been previously sworn, was examined and testified further as follows:

Direct Examination—(Continued)

* * * * * [352]

Q. (By Mr. Collins): Mr. Tobin, you admit receiving various sums from Mr. Bunker, Mr. Herning, Mr. Peecher and Mr. Barquist? A. Yes.

* * * * * [353]

Q. What did you do with the money?

A. I used it to outfit and operate the Silver Spray.

Q. Did you use any part of that money as a down payment on the Silver Spray? [354]

(Testimony of Robert J. Tobin.)

A. \$5,000.00 of it. * * * * *

Q. You are talking about spending the \$11,500.00, are you not, Mr. Tobin?

A. Yes, I am.

Q. That is the money invested by these people?

A. Yes.

The Court: That is sufficient.

Q. When did you put the vessel in drydock after it came back from Alaska?

A. I am not quite sure of the date. It was after the 7th.

Q. How much was that bill? A. \$365.00.

Q. Did you pay the bill? A. Yes. * * * * *

Q. Did you use any of these funds for your residence in Spokane? A. No, sir, I didn't.

Q. How did you maintain your home in Spokane? A. I borrowed \$2,000.00 in Spokane.

Q. In order to engage in this enterprise?

A. Yes, sir.

Q. Do you still owe that money?

A. Yes.

Q. Do you recall how much you paid the Pacific Fishing & Trading Company? [356]

A. \$200.00 and some dollars. I am not sure.

The Court: That was for what?

Witness: Food, provisions for the boat.

Q. (By Mr. Collins): Who were the legal fees paid to?

A. Mr. Swontkoski and Mr. Arthur Hanson in Spokane. * * * * *

Q. Did you use this \$11,500.00 in its entirety

(Testimony of Robert J. Tobin.)

to pursue your operation with the Silver Spray?

A. Absolutely. * * * * * [357]

Q. Do you have the contracts before you, Mr. Tobin? A. Yes.

Q. Please direct your attention to Mr. Peecher's contract. Now, the date of that contract is what?

A. May 4, 1954.

Q. Did Mr. Peecher go on the Alaska trip with you? A. Yes, he did.

Q. Willingly? A. Yes, sir. * * * * * [359]

Q. What was your explanation for the voyage?

A. For one thing, we were having a lot of engine trouble. I wasn't sure of the craft. I had never been out in it except to Port Townsend. We were approached by Shell Fish Incorporated and asked if we wanted to haul shrimp from Alaska under contract. Everybody concerned discussed the contracts, and I heard no more from them for a few days. The shareholders asked me: "What has become of Shell Fish Incorporated?" So we decided to take a shake-down cruise. The first night out Shell Fish Incorporated called us on the phone, on the radio, told us to pick up 100,000 lbs. of shrimp at Wrangell and Petersburg. We were in contact with them every night on the radio, and every shareholder heard them and listened to the conversation. When we arrived in Ketchikan, Mr. Rude called me on the phone, and he said: "Mr. Tobin, do you want a contract or do you just want to haul one trip?" I said: "We will take one trip out." I asked him to send me a wire, which he did, stating to pick [360] up 100,-

(Testimony of Robert J. Tobin.)

000 lbs. of shrimp, and the money would be deposited with—I believe it was—the Seattle National Bank—I don't recall. I then had the boat refueled, gave the wire to Mr. Lower, and they proceeded to Wrangell. When they arrived at Wrangell, they were informed—— * * * * *

Q. When did you leave this vessel?

A. I believed we arrived May 21st. I am not sure. That is the morning I left the vessel at Ketchikan.

Q. Did you talk with any of the shareholders about your departure?

A. Not at that time. I stayed in Ketchikan until the boat returned from Wrangell.

Q. I am directing your attention to your departure from Alaska?

A. Yes. I had conversations with Mr. Lower.

Q. Anybody else?

A. I believe every shareholder, Bill Barquist, for one.

Q. What did you tell them?

A. Mr. Lower was my—and Capt. Moore—were my main conversation about my leaving for Seattle—and Mr. Peecher.

Q. What reason did you give them for leaving?

A. To try to collect the money from Shell Fish Incorporated on sending us to Wrangell for shrimp and none for the boat when it arrived.

Q. You came back with Mr. Payne, was it?

A. Mr. Peecher.

(Testimony of Robert J. Tobin.)

Q. Why did Mr. Peecher leave the vessel, if you know?

A. Mr. Peecher's hands were swollen, and he felt very ill. * * * * * [362]

Q. What conversations did you have with Mr. Peecher, if any, relating to his withdrawal as a shareholder from the Silver Spray?

A. I told Mr. Peecher I would replace his share as fast as I possibly could.

Q. What did he tell you about it?

A. Well, he said: "That is fine, Bob." He said: "I don't want any trouble, and all I want is a quiet settlement." * * * * *

Q. Do you have Mr. Barquist's contract there?

A. Yes, I do.

Q. What is the date of it?

A. 4th of May, 1954, William and Mary Barquist.

Q. With respect to the date of May 4, when did you first see Mr. Barquist?

A. Three or four days previous. * * * * *

Q. Now, I am directing your attention to that first meeting. What did you tell Mr. Barquist and what did he tell you?

A. I explained to Mr. Barquist that we could fish, freight or charter. The boat could be very versatile. I told him I had a \$30,000.00 mortgage. I don't remember that [364] day whether he seen the mortgage. He seen the mortgage. I showed it to him. And he asked me for a copy of the contract.

* * * * * [365]

(Testimony of Robert J. Tobin.)

Q. On the vessel's return voyage, did you get a ship-to-shore call when the ship was out in the Sound?

A. I called the ship the night before it arrived.

* * * * * [367]

Mr. Collins: Capt. Moore is now in the court room. * * * * *

Q. (By Mr. Collins): Did Mr. Lower and Capt. Moore comply with your request to meet you at the Hotel Meany?

A. Yes, they did—at 5:30 in the morning.

Q. On what day?

A. I believe it was the 3rd—the morning the boat arrived.

The Court: You mean June 3, 1954?

Witness: Yes.

Q. (By Mr. Collins): What conversation did you have with Mr. Lower [368] at that time?

A. When he arrived at the room, we shook hands, and I asked Mr. Lower—I said: "I am endeavoring to lease a boat to haul freight with. Do you want to go tuna fishing or do you want to go up North?" He said he would like to go North with Capt. Moore.

Q. How long did that meeting last?

A. Oh, I would say a half hour.

Q. When did you see Mr. Lower again?

A. I seen him over at the Wharf Restaurant that evening at Fisherman's Wharf.

Q. Who was present at the time?

(Testimony of Robert J. Tobin.)

A. Capt. Moore, Mr. Gehrig, Doss Payne, Harry Lower.

Q. Confining yourself to Mr. Lower, what conversation did you have with him at that time at Fisherman's Wharf?

A. Told Mr. Lower I was going home; my daughter was sick. I asked him if he wanted to ride as far as Ellensburg. He said: "No. My wife is coming here."

Q. What happened throughout the remainder of June 3rd as far as you are concerned?

A. I spent the entire day endeavoring to see that the boat got to drydock so we could get the screws repaired immediately, take supplies and provisions aboard, and go South. [369]

Q. When did you arrive in Seattle from Ketchikan? A. I don't recall the date.

Q. With respect to June 3, what is your best recollection as to the time you may have reached Seattle? A. Possibly a week before.

Q. What did you do while in Seattle?

A. I checked around to see what it was going to cost to be bait-outfitted; I checked around to find out about refrigeration. I was advised my refrigeration should be got in the South because it is done better and also hunting for Mr. Nybach who had formerly contacted me before in regards to taking us South and teaching us how to fish and how to set the boat up in such a way it would be profitable.

Q. You went back to Spokane the evening of the 3rd? A. Yes, sir, I did.

(Testimony of Robert J. Tobin.)

Q. What communications did you have with any of the shareholders while in Spokane?

A. Mr. Peecher called me up and cursed at me and used vile language over the phone, and Mr.——

Q. On what day?

A. I believe it was the next day.

Mr. Armstrong: The next day from what?

A. I believe it was the 4th.

Q. Who else communicated with you?

A. Mr. Gehrig. [370]

Q. Do you remember I am talking about shareholders? A. Oh, none communicated.

Q. What other shareholders, aside from Mr. Peecher, contacted you, if they did, while you were in Spokane? A. None whatsoever.

Q. Did you try to contact them?

A. No. I went to an attorney right then.

Q. When you met with Mr. Lower and Capt. Moore on the 3rd, what instructions did you give Mr. Lower, if any, with respect to the welfare of the shareholders for the next several days? I mean at your meeting in the morning at the Edmond Meany Hotel.

A. I told Capt. Moore to let the other fellows go home for a couple of days. I asked him how long he thought it would take to repair the screws and turn the boat over to Capt. Bunker, and I asked Harry Lower if he would stay and help Don get the boat to drydock, and he said yes.

Q. Who is Don? A. Capt. Moore. I am sorry.

Q. When did you return to Seattle?

(Testimony of Robert J. Tobin.)

A. The next Monday, the 7th, I believe.

Q. What happened on Monday?

A. I went aboard the ship to endeavor to talk with the shareholders. * * * * * [371]

Q. Well, whom did you talk to at that time?

A. I couldn't talk to anybody. They were talking to me.

Q. Of the shareholders on board, who said what to you? [372]

A. It was Peecher and Mrs. Barquist.

Q. Well, what did they say?

A. Well, they called me——

The Court: You do not have to use profane language. Your statement indicating that in your former answers is a sufficient type of answer on that question. I do not wish you to use any profanity even though it may have been used by somebody else, but you can indicate the subject and the manner of speaking, et cetera, in appropriate language.

A. Well, Mr. Payne was also there.

Q. Well, of the shareholders there, what did they tell you?

A. "We want our money back by 8:00 o'clock in the morning or you are going to get 15 years in prison," and Mr. Peecher said: "I have another \$25.00 here that sees you get there."

Q. Did you discuss the terms of the contract?

A. I had no chance. I asked them to go out to my attorney.

Q. How long were you on board?

A. A very short time.

(Testimony of Robert J. Tobin.)

Q. Are there any other events connected with the Silver Spray on that date, Monday, June 7, as far as you are concerned? [373]

A. Yes. Mr. and Mrs. Barquist rode out with Mr. Gehrig and Mr. Smith to my attorney's office then.

Q. Were you there?

A. I was there; Capt. Moore was there. Capt. Moore and Doss Payne stayed outside.

Q. What was said in the lawyer's office?

A. Mr. Barquist says: "I don't want any trouble with any one." He said: "All I want is my \$2500.00 back, and I will go to the contract and give you 90 days before I file suit against you." * * * * *

Q. What were the later events concerning the Silver Spray, that is, after the 7th?

A. After this, I believe Mr. Barquist went home. [374] Mr. Peecher went back to Portland. I had the Silver Spray put in drydock. It was then attached by Mr. and Mrs. Lower. I went on ahead and paid for the repairs of the screws and had it fixed and endeavored to get the boat released time and time again so that I could proceed with the operation.

Q. Detail your efforts in connection with your attempt to release the vessel.

A. I had communications with Mr. Crutcher. I tried to get bond up. They wanted cash bond because they were asking \$5,000.00 wages. It would cost \$7,000.00 total to raise the bond. I could not get that up.

(Testimony of Robert J. Tobin.)

Mr. Crutcher: I would like the witness to refer specifically to events, if possible.

The Court: Try to be as specific as you can so that others may have some idea and be reminded of what occurred.

A. (Continued): I met with Mr. Crutcher in his office.

The Court: On what day approximately?

Witness: It was after that date some time. I do not recall the date.

A. (Continued): We discussed the subject in relation to getting Mr. Lower's \$2500.00 back, and nothing could be worked out. I kept coming back to Seattle. I would go over home and I would come back to Seattle and try to get [375] the boat released, try to get it working, endeavored to get other people interested in it. * * * * * [376]

Q. Continue now with your efforts to release the boat or with facts relating to the boat?

A. Capt. Moore and I had a meeting with Winehart Breweries in Yakima, the representative. Mr. Moore arranged it. We were endeavoring to get a job for the Silver Spray hauling beer to and from Alaska.

Q. Were you offered any specific contracts?

A. Yes. I was offered a specific contract by, I believe, Church. They are a charter agency. They said if I could get the boat released, he would say—— * * * * * [377]

Q. What was the charter offered to you?

A. Gee, I don't recall, sir. * * * * *

(Testimony of Robert J. Tobin.)

Q. How much were you offered for the use of the vessel?

A. I think it was approximately \$100.00 a day.

Q. Over what period of time?

A. Offer probably ran for a couple of months.

Q. What happened to your personal belongings that you left on board in Ketchikan?

A. I took them off in Seattle, just part of them.

* * * * * [378]

Mr. Collins: Respondents offer A-12 and A-13.

The Court: A-12, in my opinion, is not admissible. A-13 may be. Is there any objection?

(No response.) A-13 is admitted. A-12 is not.

(Respondents' Exhibit A-12 rejected.)

(Respondents' Exhibit A-13 received in evidence.) [380]

Cross Examination

Q. (By Mr. Crutcher): Mr. Tobin, did you tell Harry Lower you owned the Silver Spray when you talked with him on April 17, 1954?

A. I told him I was purchasing the Silver Spray.

Q. Answer the question, please.

A. Yes, I did.

Q. Did you own the vessel on that day?

A. Yes, I had possession.

Q. I asked if you owned the vessel on that date?

A. Yes.

Q. I refer to your answer to Interrogatory 1, in which the following interrogatory was addressed to

(Testimony of Robert J. Tobin.)

you to be answered under oath: "On what date did you become the owner of the vessel Silver Spray?" You answered: "On or about April 28, 1954." Is that answer true or false? * * * * * [381]

A. It is true. * * * * *

Q. Then as of April 16, 1954, you were representing that you owned and operated the Silver Spray? A. No.

Q. Well, Mr. Tobin, this exhibit which is before you and bears your signature states: "Silver Spray Owned and Operated by R. J. Tobin."

A. Yes.

Q. Well, then you were representing that you owned the vessel? [382] A. Yes.

Q. But you did not purchase it until April 28?

A. I had a purchase agreement.

Q. I say you did not purchase it until April 28, 1954, did you? A. That could be true, yes.

Q. Either it is true or is not true.

A. It is true.

Q. Did you tell Harry Lower you did not own it but were simply purchasing it?

A. I showed Mr. Lower the purchase agreement.

Q. Did you tell him that you owned it or did you tell him that you were purchasing it?

A. I told Mr. Lower I was purchasing it and we would have the mortgage within a week or so. * * * * * [383]

Q. Can you explain to the Court what this working share is in a vessel? [385]

(Testimony of Robert J. Tobin.)

A. The working share was to be divided out of the profits of the vessel.

Q. Does it give to the party who contracts with you any right or interest in the vessel itself?

A. No.

Q. So these people were simply your employees?

A. No. They were not.

Q. I refer again to the terms of your contract, clause 2. (Reads clause 2 of Respondents' Exhibit A-1.) You were the first party in these contracts, were you not? A. Yes.

Q. So that these people were to work under your orders? A. Yes.

Q. Then in what respect were they not your employees?

A. In the respect that they had the right to share in all the profits of the boat.

Q. As a means of compensation?

A. As a means of compensation. They could receive their money back. They understood that it was money to be used for the venture.

Q. What was the purpose of this money?

A. Was to outfit the Silver Spray.

Q. And also to buy it? A. Yes. [386]

Q. In other words, these people were advancing money to you so that you could buy the boat, is that right? A. That is right.

Q. Did you tell those people that? A. Yes.

Q. I ask you now specifically did you tell Harry Lower that you were taking a part of this money and with it paying the down payment on the boat?

(Testimony of Robert J. Tobin.)

A. I don't recall. * * * * *

Q. Did you tell Mr. Herning that you were going to take part of the working share money and make a down payment on the vessel? A. No.

Q. Did you use the money he advanced for that purpose? A. Yes. * * * * * [387]

Q. Did you tell them that you were not putting any of your own money into the venture?

A. No. I did not.

Q. How much of your own money did you put into the venture? A. I borrowed \$2,000.00.

Q. What time was that?

A. That was some time in March. I believe March some time. I am not sure.

The Court: How much, if any, of that \$2,000.00 did you put into the purchase price you were paying or obligated to pay for the Silver Spray?

A. I put that money into a vessel called the Sockeye.

Q. With respect to the Sockeye, did you receive \$500.00 from Mr. Kadlec? A. Yes, sir.

Q. What did you do with that money?

A. That money is in the Sockeye.

Q. Mr. Doss Payne who was formerly a libelant in [388] this action gave you \$2500.00. What was done with that?

A. It is in the Sockeye.

Q. Did you ever buy the Sockeye?

A. I had a purchase agreement and equity in it.

Q. I asked if you ever bought the Sockeye?

A. No.

(Testimony of Robert J. Tobin.)

Q. Did you ever represent to Mr. Kadlec that you owned the Sockeye? A. No, I did not.

Q. Do you have before you your contract with Mr. Kadlec? A. Yes, I do.

Q. Read the caption of that contract?

A. (Reading): "Working Share and Contract on Boat or Boats Owned and Operated by R. J. Tobin."

Q. This contract has to do with the Sockeye?

A. Yes.

Q. Would you read clause 1 of that contract?

A. (Reads cause one of Respondents' Exhibit A-10.)

Q. And the last line is "fishing boat Sockeye or tuna Boat, owned by the first party"? A. Yes.

* * * * * [389]

Q. Now, you say you had an agreement to purchase the Sockeye. Was that agreement signed by both owners of the Sockeye?

A. I do not know.

Q. Did you know that one of the owners of the Sockeye was in Norway? A. No, I did not.

Q. Did you ever receive a bill of sale for the Sockeye? A. No, I did not.

Q. Where is the Sockeye now?

A. I do not know. * * * * * [390]

Q. Have you transferred your equity or sold whatever interest you may have had in the Sockeye—and I am honest to say I don't understand what interest you do have?

(Testimony of Robert J. Tobin.)

A. Yes. I have a contract and note. When the boat is sold, I am to receive \$2600.00. * * * * *

The Court: We will take a noon recess.

(At 12:05 o'clock p.m., Friday, September 17, 1954, proceedings recessed until 2:00 o'clock p.m., Friday, September 17, 1954.) [391]

Seattle, Wash., Sept. 17, 1954, 2:00 o'clock p.m.

The Court: You may proceed. * * * * *

Q. (By Mr. Crutcher): I am concerned here with Mr. Kadlec. You took \$500.00 of his money on the basis of a contract wherein you stated you were the owner of the Sockeye? [392]

A. Yes.

Q. What right did that payment give him in the Sockeye?

A. As his contract stated, one third of the share of the catch of fish.

Q. He was to fish on the vessel, is that correct?

A. Yes.

Q. Now, what happens when the vessel does not work, in other words, when there is no use of the vessel? Is Mr. Kadlec unemployed?

A. Every one is unemployed, yes.

Q. When Mr. Kadlec went on board the Silver Spray, did you give him any duties to perform there? A. No specific duties.

Q. Well, Mr. Kadlec has testified that he stood watch as helmsman and as assistant engineer, is that correct? A. Yes.

(Testimony of Robert J. Tobin.)

Q. During such time was he under the discipline of the captain? A. Yes.

Q. What sort of compensation was Mr. Kadlec entitled to by reason of those services, if any, on the Silver Spray? A. None whatsoever.

Q. In other words, Mr. Kadlec was volunteering [393] his services for the Silver Spray, is that correct? A. Yes, sir.

Q. Did you have a clear understanding with him to that effect? A. Yes, I did. * * * * *

Q. Under the terms of this contract, if these people were not your employees, what were they?

A. Sharers in the venture.

Q. What sort of venture are you referring to?

A. The tuna fishing venture.

Q. Where was this tuna fishing venture to be carried out? A. In Southern waters.

Q. Now, I will revert to my original question. What was the purpose of the money which these people gave to you at the time they signed their contracts with you?

A. To outfit, provision and operate the Silver Spray. * * * * * [395]

Q. Now, Mr. Kadlec gave you \$500.00. You have already testified that the money which you yourself put into the venture went into the purchase of what you yourself described as an equity in the Sockeye. What happened to Mr. Kadlec's money?

A. The money coming back from the sale of the Sockeye which I am to receive and have not

(Testimony of Robert J. Tobin.)

received from Mr. Flagler was to go to Mr. Kadlec and Mr. Payne. [396]

* * * * *

Q. Now, when did you commence doing business on behalf of the Silver Spray after you came back from Spokane to Seattle?

A. If it was a Saturday, it would have been a Monday morning.

Q. Which would be April 26, I believe?

A. Yes.

Q. What did you do while you were here in Seattle that first day which related to the operation of the Silver Spray?

A. I was around town, Seattle, gaining what information I could about getting us outfitted and getting us South as fast as possible. [398]

* * * * *

The Court: How did you get this idea of selling these contracts and getting these \$2500.00 sums?

Witness: The only way I could see at the price and the cost of boats and their high operation,—there are a number of fellows like myself who want to fish but could not afford to go into an expensive high-priced boat and outfit it, where, if a group were in it, it would be possible to do so. [403]

* * * * *

The Court: Were you correspondingly concerned [404] about the outturn of the expense being caused to the persons planning to become fishermen from each of whom you took this contribution of \$2500.00? Did that give you any concern?

(Testimony of Robert J. Tobin.)

Witness: Yes, sir, it did, very much so, and I told the fishermen, the shareholders, that we had three alternatives with the boat. If we had bad fishing, the possibilities I could see for it were charter work or freight work for the boat.

The Court: You say you had never handled any boats before?

Witness: No, sir, just a small troller in Alaska. I had no knowledge of this big a boat. [405]

* * * * *

Q. (By Mr. Crutcher): Did you run an advertisement in the April 23rd issue of the Seattle Times? A. Yes, I did.

Mr. Crutcher: If I may take just a single sheet from this newspaper——

(Discussion.)

The Clerk: Libelants' Exhibit No. 3.

(Sheet of Newspaper marked Libelants' Exhibit No. 3 for identification.)

Q. (By Mr. Crutcher): Mr. Tobin, will you kindly refer to Libelants' Exhibit No. 3, to the newspaper advertisement on page 36 which is outlined in red and state to the Court whether that [407] is the advertisement referred to by you in your answer to the last question? A. Yes.

Mr. Crutcher: I offer that in evidence.

Mr. Collins: No objection.

The Court: It is admitted.

(Libelants' Exhibit No. 3 received in evidence.)

* * * * *

(Testimony of Robert J. Tobin.)

Q. Then when you ran an advertisement in the Seattle papers on May 29 and 30, you did know about the bait tanks and refrigeration?

A. I don't know whether I did or didn't at that time.

Q. Did you run an advertisement in response to which Mr. Bunker came to see you in your hotel room June 2nd? A. Yes.

Q. Was that the advertisement which referred to Mr. Gehrig as your business agent?

A. Yes.

Q. At that time then you did know, did you not, that bait tanks and refrigeration were requisite to large scale tuna fishing? A. Yes.

Q. Did you discuss either bait tanks or refrigeration with Mr. Bunker?

A. Yes, I did. [415]

* * * * *

Q. On the morning of June 3, when you talked with Mr. Lower and Capt. Moore, did you say anything to them about going on South for tuna fishing with the vessel? A. Yes, I did.

Q. What did you say to them?

A. I asked Mr. Lower if he wanted to go South for tuna; that Capt. Moore was coming off; Mr. Bunker was staying on; that Capt. Moore was going North. Mr. Lower then said: "I would prefer to go North with Don Moore."

Q. How were you planning the trip North, on what vessel?

A. That was prospective in regards to Mr. Geh-

(Testimony of Robert J. Tobin.)

rig. He sold me on the idea a very good living could be made from having a boat chartered and running North with hiring out to these places, hauling stuff like, oh, they had construction out here they wanted to—Mr. Payne was also interested in that—and they approached me with it, about taking down these apartment houses you buy, these Government apartment houses, and moving them to the North on the boat, and building them.

Q. Were you planning to use the Silver Spray in that trade? A. No.

Q. Then, on the morning of June 3, you still intended to take the Silver Spray South for tuna fishing? [416] A. Yes, I did.

Q. And you were in urgent hurry to do that?

A. I wanted to do that, yes.

Q. The tuna fishing season was already well advanced, was it not?

A. No, I don't believe so. Mr. Overman told me that there would be no rush to get down before June 21st.

Q. So on the morning of June 3rd you still planned to go tuna fishing? A. Yes, I did.

Q. Where did you go on the night of June 3rd?

A. I went to Spokane.

Q. What was the purpose of that visit?

A. My daughter was ill.

Q. How long did you stay in Spokane?

A. I returned the following Monday.

Q. That was on June 7? A. Yes.

(Testimony of Robert J. Tobin.)

Q. In the meantime, had you made any arrangements for the voyage South?

A. The arrangements I made at that time were for the boat to go to drydock.

Q. With whom did you make those arrangements?

A. Mr. Gehrig, Mr. Moore, and Mr. Lower.

Q. What arrangements were made for provisioning [417] the vessel?

A. I didn't put provisions on at that time because there would be no necessity of putting provisions on until it came out of drydock because everybody would be gone home.

* * * * *

Q. Now, you have testified that on June 4, while you were in Spokane, you went to see an attorney after receiving a telephone call from Mr. Gehrig?

A. Yes.

Q. What was the occasion of calling on the attorney?

A. Mr. Gehrig explained to me that the shareholders wanted to take over the boat and I had better consult an attorney.

Q. Now, what happened between the morning of June 3 and June 4 which caused this remarkable change of plans or events?

A. That I do not know.

Q. Is it your position now that as of June 7 you were still planning to immediately take the vessel South for tuna fishing? A. Yes. [418]

Q. Mr. Barquist has testified that when he asked

(Testimony of Robert J. Tobin.)

you what your plans were or "What do we do now", you said: "Let's go to my attorney and you will get your money." Is that testimony true or false?

A. Part of it is false; part of it is true.

Q. Will you explain?

A. Yes, I will. At that time it was, as I explained in earlier testimony, there was confusion in there, and I was frightened, and I asked them to go to my attorney with me, and that is where we went, Mr. Swontkoski's office.

* * * * *

Q. If you then were planning on immediately leaving for the South to go tuna fishing, why was there all this disturbance on board?

A. That I do not know. [419]

* * * * *

Q. Was there any agreement between yourself and Mr. Lower as to when and under what circumstances the \$2500.00 would be returned to him?

A. According to the contract?

Q. Well, I mean your understanding with him, either by reference to the contract or without it?

A. Yes. My understanding with Mr. Lower was that if he would give me 30 days' notice and an additional 90 days, I would give him this money back.

Q. So 120 days from the day he decided to quit the vessel, the employment of the vessel, he would get his money back, is that correct? A. Yes.

Q. And the use of the money by yourself was

(Testimony of Robert J. Tobin.)

the consideration under which he was entitled to work aboard the vessel, is that correct?

A. Yes. [422]

* * * * *

Q. It is possible, is it, that some one could pay you the \$2500.00 and sit at home and receive his share?

A. Oh, absolutely not, no.

Q. In other words, he had to be working for you in order to be entitled to his share of the catch?

A. Yes.

* * * * *

Q. Was there some condition under which they would forfeit the \$2500.00?

A. No, sir. Mr. Lower did not comply with the agreement and tied up the boat so it was unable to do anything.

Q. Did he forfeit his right to the return of his \$2500.00?

A. Well, I believe he should; he tied the vessel up. [423]

* * * * *

Mr. Crutcher: I have concluded. Mr. Armstrong has a couple of questions he would like to ask.

Cross Examination

Q. (By Mr. Armstrong): Mr. Tobin, when you discussed with Mr. Peecher in Ketchikan, Alaska, his leaving the vessel, was that discussion relative to Mr. Peecher's permanently leaving the vessel or was it temporarily because of his arthritis?

(Testimony of Robert J. Tobin.)

A. I believe it was permanent leave of the vessel.

Q. Isn't it true that he asked you at that time to be permitted to come down to Seattle because of the weather in Alaska, and that he intended to go further with the vessel if it went to Southern waters?

Witness: Would you repeat that?

(Last question is read by the reporter.)

A. No. I don't know.

Q. How do you account for your letter to him on the 28th if that isn't true then, Mr. Tobin?

The Court: Are you familiar with your letter of the 28th?

Witness: Yes.

A. I felt that it was, oh, indefinite on his part and my part, both; that I didn't fully understand or he did [425] either, which was happening there.

* * * * *

Q. It was your thought when you left Alaska that if you had gone to Southern waters for tuna fishing that Mr. Peecher would have been on board? You fully expected that?

A. Yes. [426]

* * * * *

Q. And on June 3, did you have all of your personal belongings off of this vessel?

A. No, I did not.

Q. What other personal belongings did you leave on the vessel?

A. All my rain gear, blankets, gloves, miscellaneous clothing, overshoes.

(Testimony of Robert J. Tobin.)

Q. Necessary items you left on the vessel?

A. Yes.

Q. But you took off on June 3 what you considered your personal gear except for these few items?

A. Yes. I took my bedroll off.

Q. Did you take these additional clothes that you are speaking of off? A. Yes. [427]

Q. Did you take a radio off?

A. Yes. [428]

* * * * *

The Court: Why did you take that stuff off on that day?

Witness: So Mr. Bunker could move aboard and take over as captain and have the captain's quarters.

The Court: Were you intending thereafter to act as captain or have anything to do as one on board with the management of the vessel, with the navigation and work of the vessel?

Witness: Your Honor, I intended to go on ahead to California before the boat got there.

The Court: You say "so Mr. Bunker could take over"?

Witness: Yes. He was going to take over as captain and take the boat out. * * * * * [429]

Q. (By Mr. Armstrong): Did you advise any member or shareholder—when I refer to crew members, I am speaking primarily now and only of shareholders—did you advise any of those persons that you did not intend to be aboard this vessel

(Testimony of Robert J. Tobin.)

and travel with them to California for tuna fishing?

A. Yes, I discussed that.

Q. Whom did you tell that you did not intend to go?

A. Mr. Lower, at an earlier date.

* * * * *

Q. Is Mr. Lower the only person you discussed that with? [430]

A. May have been; may not have been. I do not recall.

Q. May I presume from your answer that this discussion was prior to the time you left for Alaska?

A. Yes.

* * * * *

Q. Did you have any further money when that vessel got back to Seattle, M. Tobin, to outfit it for fishing or to pay for any provisions to go to Southern waters?

A. Yes, I believe, recalling right now, I had around \$2,000.00. [431]

Q. All right. Now you told us that you received \$11,500.00 and it had cost you approximately \$6,500.00?

A. It couldn't have because I didn't have Mr. Bunker's.

Q. Isn't it true that part of Mr. Bunker's money went toward the cost of this venture in Alaska, to pay for some of the expenditures made up in Alaska by the vessel?

A. No, sir.

Q. Then you wish to correct your testimony? It did not cost you \$6,500.00 to make this Alaska venture?

A. That is right.

(Testimony of Robert J. Tobin.)

Q. How much did it cost you?

A. The lay-up caused by the crew members is what——

The Court: No. Just say what it cost you. Instead of \$6,500.00, if you think now it cost you some other sum, say what it was.

Witness: Approximately \$5,000.00.

Q. (By Mr. Armstrong): Then at the time you arrived in Seattle you had, according to your testimony, \$2,000.00 with which to proceed to California?

A. I do not know—at that time.

Q. Will you please give us your best estimate of how much money you had available?

A. I figured there was easily money to fully fuel, [432] put all supplies and stores aboard the boat.

Q. How much did you figure that would cost you? A. Oh, gee, I have no idea.

Q. Now, you just told us you figured it was fully enough. How much? You must have had some idea. You were here for three days, you said, talking about outfitting. How much was it going to cost you to take that boat tuna fishing?

A. Fueling would have cost around \$250.00 or \$300.00, alone, for fuel. Food would probably run in the neighborhood of \$300.00 or \$400.00.

Q. That would leave you some money left available when you arrived in San Diego, is that correct? A. Yes.

Q. Am I correct in presuming from your testi-

(Testimony of Robert J. Tobin.)

mony that when you arrived in California you intended to place bait tanks and refrigeration on board this vessel? A. If possible, yes.

Q. Did you make that representation to the other crew members who were shareholders and are these libelants?

A. For eventuality, yes. [433]

* * * * *

Q. Was this vessel represented to you by any one as being a tuna clipper prior to the time that you printed up your printed documents which you have in evidence here with these various libelants a sbeing your contract? * * * * *

A. Yes.

Q. By whom? A. Mr. Flagler.

Q. Who was Mr. Flagler?

A. He operates a boat sales office. [441]

* * * * *

Q. When did Mr. Flagler tell you this vessel was a tuna clipper? Did Mr. Flagler tell you at that time? A. Not at that time, no.

Q. At a later time? A. Yes.

Q. Did any further negotiations relating to the purchase of this vessel take place through Mr. Flagler? A. No. [443]

* * * * *

Mr. Armstrong: I have no further questions.

Cross Examination

Q. (By Mr. Allison): Mr. Tobin, did you not use the \$2500.00 which Mr. Herning paid to you

(Testimony of Robert J. Tobin.)

as part of the purchase price of this vessel, the Silver Spray? A. Yes.

Q. You used Mr. Herning's money and Mr. Lower's money, did you not, to pay down on the purchase of the vessel? A. Yes.

Q. Did you tell Mr. Herning you were going to use his \$2500.00 for the purchase of this vessel?

A. No.

Q. Did you have any discussions with Mr. Herning whatsoever about any other operation for the use of the Silver Spray other than tuna fishing?

A. Yes. We talked numerous operations. [446]
* * * * *

Q. Did you have a conversation over the telephone with Mr. Herning on the morning of June 3, 1954? A. Yes, I did.

Q. Have you had any contacts with Mr. Herning other than that telephone conversation since that date? A. No, I haven't.

Q. Mr. Herning has not made any demand upon you for the return of \$2500.00 or any other demand with the exception of this libel which he has filed?

A. That is right.

Q. You have not seen Mr. Herning since you left him in Alaska, is that correct?

A. That is right, yes.

Mr. Allison: That is all. [447]

* * * * *

Redirect Examination

Q. (By Mr. Collins): Were any conversations

(Testimony of Robert J. Tobin.)

had relating to the fact that your contracts called the vessel a clipper?

A. No. We had discussions.

The Court: You can ask him what his state of mind and purpose was regarding it. I think that is material, his state of mind as to deception.

Q. (By Mr. Collins): What was your purpose in designating it as a [449] clipper in the contracts? A. I thought it was a clipper.

Q. Did you have any intent to deceive any one by the use of the word? A. No.

* * * * *

Mr. Collins: I have no further questions. [454]

* * * * *

The Court: You may step down.

(Witness excused.)

JAMES T. GEHRIG

called as a witness by and on behalf of respondents, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Collins): State your full name, please. A. James Taylor Gehrig.

Q. Where do you live?

A. 4122 42nd N.E., Seattle. * * * * *

Q. By the way, you have no interest in this [455] litigation, have you?

A. None whatsoever, no. * * * * *

Q. Were you on board the vessel on the 5th or

(Testimony of James T. Gehrig.)

the 6th or the 7th? A. Yes. [456]

* * * * *

Q. Will you tell the Court about that occurrence and who was present?

A. I went aboard the vessel one afternoon—I think it was the day after the boat returned—and at that point there were a great many people mad at each other, and what I was trying to do was to settle the thing down to the point where the boat could continue to operate and so money could be made out of the operation.

Q. Well, who was mad at who?

The Court: If you know or observed.

A. Mr. Peecher was mad at me.

Q. What did Mr. Peecher have to say about tuna fishing? [457]

A. Mr. Peecher wanted to go tuna fishing.

Mr. Armstrong: I didn't understand that.

(Last question and answer are read by the reporter.)

Q. (By Mr. Collins): Who else was mad at who else? A. Mrs. Lower was mad.

Q. Who was she mad at?

A. Well, I assumed that Mrs. Lower was mad because she wouldn't talk to me, and I assumed she was mad at me.

* * * * *

Q. Well, what was the general situation?

A. The general situation was this: The boat comes back from Alaska. Tobin tells me he wants the boat to go to Southern waters for tuna fishing

(Testimony of James T. Gehrig.)

and tells me that he has advised Capt. Moore to prepare the boat for tuna fishing. I advised Mr. Tobin it would be a speculation to go tuna fishing at that date because I know nothing of tuna fishing myself.

The Court: Is that the reason you told him—why you so advised him as you just stated?

Witness: Yes, because I knew nothing of [458] tuna fishing myself.

A. (Continued) I had previously made a number of contacts whereby cargo could be taken from Seattle to Southern ports in Alaska, and it seemed to me at that time that a bird in the hand was worth two in the bush. In other words, I advised Mr. Tobin to take the cargo contracts that were available at that time rather than go tuna fishing.

Q. Some shareholders I assume then had differences of opinion with you?

A. I didn't discuss that with the shareholders.

Q. Well, coming back to this meeting where some shareholders were disturbed, did Mr. Tobin come aboard?

A. Mr. Tobin came aboard, yes, he did.

Q. Who was on board at the time?

The Court: If you can recall any more than you have already said.

A. I can recall Mr. Payne, Mr. Tobin, Mr. Peecher, myself, Mrs. Barquist and Mr. Barquist.

Q. Do you recall any conversation between Tobin and the Barquists at that time?

A. Mr. Barquist?

(Testimony of James T. Gehrig.)

Q. Yes.

A. No. I don't recall any conversation between the two of them.

Q. What was Mr. Barquist's attitude about the venture? [459]

A. Mr. Barquist was quite bitter toward Mr. Tobin.

Q. What did Mr. Barquist want to do?

A. Mr. Barquist wanted to retire from the venture and get his money back.

Q. And you said a moment ago Mr. Peecher wanted to go fishing?

A. Mr. Peecher indicated that to me, yes.

* * * * *

The Court: What was your connection with the vessel, if any?

Witness: My connection with the vessel was that I provided the insurance for the vessel. It was as an insurance agent. [460]

* * * * *

Q. Who was on board then, beside Peecher, Barquist, Payne and Tobin?

A. Don Moore was there and Mrs. Barquist.

Q. Was Mr. Lower present?

A. No. I think that Capt. Bunker was aboard at that time.

Q. Well, what was Mr. Bunker's attitude?

A. Capt. Bunker was, as far as my understanding was concerned, was to take the boat tuna fishing, and he was down there to assume responsibility for it.

(Testimony of James T. Gehrig.)

Q. And what was Tobin's disposition as to the tuna fishing venture? [461]

A. Mr. Tobin told me the boat was going tuna fishing.

Q. Was there what you might call a violent disagreement between any one and Mr. Tobin?

* * * * *

A. Mr. Peecher had been somewhat disturbed. He was considerably upset at me the day I went aboard. He lost his temper toward me. The same thing happened the night Mr. Tobin came aboard the Silver Spray, but I attributed that to a loss of temper and not being a violent thing.

Q. Well, what was the outcome of this meeting?

A. Well, the outcome of the whole thing was that I took Mr. Barquist, Mrs. Barquist and my partner at the time in my car, and we followed Mr. Tobin, Mr. Payne, and Capt. Moore from the wharf to Mr. Swontkoski's office with one stop on the way out there.

Mr. Collins: That is sufficient.

The Court: Any cross examination? [462]

* * * * *

Cross Examination

Q. (By Mr. Armstrong): Did you believe that if these people who were shareholders had had definite information from Mr. Tobin as to what that vessel was going to do, and especially that it was going to go tuna fishing as soon as it could be repaired, that there would have been any dissension among them? [465]

(Testimony of James T. Gehrig.)

A. The men on the boat, when it came back here, knew that the boat was going tuna fishing.

The Court: Mr. Gehrig, could you gather from all that occurred in your presence what it was that was the principal cause of the disturbance, and what it was that they were displeased with? What kind of a policy, if any, of the boat's management were they displeased with?

Witness: I can't answer that, Your Honor.

The Court: Were you not able to learn on that occasion what it was that was causing trouble?

Witness: I was very close to Mr. Tobin. I was very close to all the individuals on the boat. Mr. Tobin told me that the boat was going tuna fishing. He sent a telegram to the boat in my presence for the attention of Mr. Lower.

The Court: That was at Ketchikan, was it not?

Witness: Yes.

The Court: That is not the time we are talking about. We are talking about the time the boat returned from Alaskan waters on or about the 7th of June when there was some dissension on the boat and when you said a lot of people were mad at each other or at somebody.

Witness: Yes, they were. [466]

The Court: What was it on that occasion, if you knew or were able to tell then, that was the central core of that irritation?

Witness: The central core of the irritation, Your Honor, came from the men not understanding what was going on.

(Testimony of James T. Gehrig.)

The Court: You may inquire.

Mr. Armstrong: I have no further questions.

Cross Examination

Q. (By Mr. Crutcher): On the night of June 7, were you present at that meeting, the Monday following the week in which the vessel arrived back in Seattle?

A. Well, that was the occasion when Mr. Tobin came aboard. Yes, I was there.

Q. Were you instrumental in getting Mr. Tobin to come back from Spokane to Seattle for that meeting?

A. I tried very hard to get Mr. Tobin to come back for the meeting.

Q. By long distance telephone calls?

A. Several.

Q. Now, at that meeting, did you hear Mr. Barquist ask Mr. Tobin what he planned to do?

A. Mr. Crutcher, I don't recall that if he asked [467] him; I don't know.

Q. Did any one ask Mr. Tobin what he planned to do with the vessel?

A. I believe several people did.

Q. And what did Mr. Tobin say?

A. "See my attorney."

Mr. Crutcher: I have no other questions.

Mr. Allison: No questions.

The Court: You may step down.

(Witness excused.)

Mr. Collins: The respondents subpoenaed Capt. Moore.

The Court: If Capt. Moore is present, please come forward.

(No response.)

Mr. Collins: If not, we rest.

The Court: The respondents rest. Any rebuttal?

* * * * * [468]

HARRY C. LOWER

called as a rebuttal witness by and on his own behalf, having been previously sworn, was examined and testified further as follows:

Direct Examination

* * * * *

Q. (By Mr. Crutcher): Do you recall the conversation which you had with Mr. Tobin at his home in Spokane on April 17, 1954?

A. Most of it, yes.

Q. Can you state to the Court whether, at this time, you recall whether Mr. Tobin told you he owned the vessel Silver Spray or not?

A. Yes. He said: "I own that vessel. That is my vessel." He showed me a picture.

Q. Did he say anything about a purchase contract? A. Not that I remember, no. [469]

* * * * *

GEORGE S. HERNING

called as rebuttal witness by and on his own behalf, having been previously sworn, was examined and testified further as follows:

Direct Examination

Q. (By Mr. Allison): Mr. Herning, when you discussed the purchase of this share with Mr. Tobin on April 27, did he state to you that he owned the Silver Spray at that time? A. He did.

Q. He did? A. Yes.

Q. Now, Mr. Herning, did you ever discuss with Mr. Tobin at any time any venture other than tuna fishing? A. No, I did not. [470]

* * * * *

The Court: You may proceed, Mr. Carey, with the case in chief of intervening libelants Putnam and Overman.

Mr. Carey: It is stipulated between the respondent Tobin, as owner, and Putnam and Overman, mortgagees, that the preferred ship mortgage described in the Putnam and Overman intervening libel is a valid, subsisting, preferred mortgage, and that the defaults have occurred as alleged in that intervening libel. Is that correct, Mr. Collins?

Mr. Collins: That is correct.

Mr. Carey: It is stipulated between the intervening libelants Putnam and Overman, as mortgagees, and the various shareholders represented by Mr. Crutcher, Mr. Armstrong, Mr. Allison and Mr. Wells that the preferred ship mortgage described in the Putnam and Overman intervening libel is

a valid, subsisting mortgage subject to the priority of any [471] maritime lien that may be found to have been proven by the evidence that, as a matter of law, are superior to that preferred ship mortgage, is that correct, gentlemen?

Mr. Crutcher: Yes.

Mr. Armstrong: Yes.

Mr. Allison: Yes.

Mr. Wells: Yes.

Mr. Carey: It is further stipulated by all counsel that the matter of attorney's fee to be allowed for the foreclosure of the mortgage shall be left to the discretion of Your Honor, if Your Honor will assume that obligation.

The Court: I will hear some statement about what work was done if counsel cannot agree upon what the fee should be. Also, I wonder if you should not file in the records and introduce in evidence as an exhibit the original note and mortgage.

Mr. Carey: I was just going to do that. The mortgage and note should be taken out of circulation.

The Clerk: Libelants' Exhibit 4.

(Preferred Mortgage marked Libelants' Exhibit 4 for identification.)

Mr. Carey: That is the ship's mortgage. I now [472] offer note dated April 28, 1954, being a note stipulated to be in default.

The Clerk: Libelants' Exhibit 5.

(Note marked Libelants' Exhibit 5 for identification.)

The Court: Do you offer each of these exhibits?

Mr. Carey: Yes, Your Honor.

The Court: Libelants' Exhibit 4, denominated "Preferred Mortgage" is offered. No objection being stated, it is now admitted.

(Libelants' Exhibit 4 received in evidence.)

The Court: Has any one any objection to Libelants' Exhibit 5, which purports to be the original note for the sum of \$30,000.00? There being no objection, that is now received in evidence.

(Libelants' Exhibit 5 received in evidence.)

Mr. Carey: I now offer, with the consent of counsel, a "Certificate of Ownership" of the vessel dated August 23, 1954, certified by the Collector of Customs. [473]

The Clerk: Libelants' Exhibit 6.

(Certificate of ownership of vessel marked Libelants' Exhibit 6 for identification.)

The Court: Is there any objection to its offer? It is admitted.

(Libelants' Exhibit 6 received in evidence.)

Mr. Carey: That is all, Your Honor. We rest.

* * * * * [474]

The Court: This case is continued for further trial proceedings on the merits, including arguments on the merits, to the afternoon of Monday, October 11, at 2:00 o'clock p.m.

(At 4:45 o'clock p.m., Friday, September 17, 1954, proceedings recessed until 2:00 o'clock p.m., Monday, October 11, 1954.) [475]

Seattle, Wash., October 18, 1954, 10:00 o'clock a.m.

The Court: May I ask counsel in the Silver

Spray case, the Court being again in session, if you are ready to proceed with the argument of that case on the merits?

All Counsel: Yes.

(Discussion concerning the allotting of time for argument.)

(Arguments made by proctors on behalf of libelant, additional libelants, additional intervening libelants, and respondents.)

The Court: As to the intervening libelant Kadlec, notwithstanding the form of his libel and the statements therein contained, he proved a contract for a specific wage, and he worked and earned a specific wage upon the agreed compensation of \$100.00 per week. While it might be argued that [476] there was some five and one-half weeks time involved, I think the more certain proof as to time would be five weeks, and so from a preponderance of the evidence the Court finds, concludes and decides as to that intervening libelant that he entered upon agreement with the respondent Tobin that he, Mr. Kadlec, should be employed and he was employed on a vessel of the respondent Tobin, to wit, the Silver Spray, at the agreed specific wage of \$100.00 per week, and that he worked for five weeks, entitling him to a decree in this case that he has a maritime lien for seamen's wages for that length of time; that the lien is against the vessel the Silver Spray; that he is entitled to have the vessel condemned and sold and to receive from the proceeds thereof his costs in this action to be taxed and to further have out of such proceeds his wages

so adjudged to be due him for said five week period at \$100.00 per week.

Further, the Court so finds, concludes and decides that the intervening libelant Kadlec never effectually entered into any agreement to work for the respondent Tobin on the Silver Spray or elsewhere upon any fisherman's lay contract.

In respect to the libelant and the other [477] intervening libelants in this action, the Court from a preponderance of the evidence does find, conclude and decide as follows:

That of such causes of action as the libelant and intervening libelants had on June 7, 1954, one such cause of action was for the recovery of damages to the extent of the value on that date of libelant's and intervening libelants' share in the prospective fishing catch of the Silver Spray equipped as a fresh bait tuna fishing boat and tuna clipper for the fishing season of 1954, and on that cause of action the libelant and intervening libelants sued in their libels.

It is possible that such libelant and intervening libelants also had on that day a cause of action at common law against respondent Tobin for fraud and deceit or some other action at law, but on that date such libelant and intervening libelants were not required against their choice to sue upon such causes of action at law, and they did not do so.

The mere fact that on cross examination one or more of them may have given testimony tending to evidence a cause of action at law does not in this case prevent the libelant and intervening [478]

libelants from disavowing any request or intention of request for any relief in this admiralty court on any such cause of action at law, and each and all of such libelant and intervening libelants have effectually disavowed any such intent through their counsel who have a right to speak for them.

From a preponderance of the evidence in this case, the Court finds, concludes and decides further that, upon the authority of *Carbone vs. Ursich*, 209 F2d 178, among other authorities, libelant and intervening libelants on June 7, 1954 had a valid cause of action in rem against the vessel *Silver Spray*, her engines, tackle, apparel, furniture and equipment, and also in personam against Robert J. Tobin for damages to the extent of the then value of the share of each of said libelant and intervening libelants in and to the prospective tuna fish catch of the *Silver Spray* as a tuna clipper, as a fresh bait tuna fisher, for the season 1954; that such right was secured by a maritime lien at that time, namely, June 7, 1954, against the vessel *Silver Spray*, her engines, tackle, apparel, furniture and equipment; and that the nature and rank of such lien was one for seamen's wages and has a rank superior to the maritime lien of the [479] preferred ship mortgage which is involved in the intervening libel of intervening libelants Putnam and Overman; that the value of such share in such prospective season's fish catch is the sum of \$7500.00, for which amount each libelant and intervening libelant has a maritime lien against said *Silver Spray*, her engines, tackle, apparel, furniture and equipment, and

also has a right in personam against Robert J. Tobin, the respondent;

That the respondent Robert J. Tobin abandoned the contract of employment of libelant and intervening libelants and also the fishing voyage on said 7th day of June, 1954; that at all times prior thereto and subsequent to the date of the lay fishing agreement of each of such libelant and intervening libelants respectively, they and each of them were ready, able, and willing to perform said lay fishing contract on their and each of their parts to be performed; and that the abandonment of the said fishing voyage and of said lay fishing contract by the respondent Robert J. Tobin, the owner and operator of said Silver Spray, was through no fault of either of such libelant and/or intervening libelants.

That in respect to said sum of \$7500.00 [480] adjudged to be due and owing to each of said libelants and intervening libelants and for which each of them has a valid and subsisting maritime lien against the said vessel, her engines, tackle, apparel, furniture and equipment, they are entitled to have such vessel and her engines, tackle, apparel, furniture and equipment condemned and sold and the proceeds thereof applied, first, to the maritime liens of each of such libelant and intervening libelants in this action and to the payment of costs and disbursements properly taxable as costs in this action.

That the said maritime lien of each of such libelant and intervening libelants is superior to the maritime lien of the preferred mortgage of inter-

vening libelants Putnam and Overman in this action

That the intervening libelants Fred I. Putnam and James A. Overman, as mortgagees under the preferred mortgage in this case, have a preferred mortgage lien and a maritime lien against said vessel *Silver Spray*, her engines, tackle, apparel, furniture and equipment, and in personam against Robert J. Tobin for the sum unpaid, as to which I ask counsel to state the exact amount [481] computed as of the date when judgment and decree are to be entered, to secure the obligation of said Robert J. Tobin and said vessel and her engines, tackle, apparel, furniture and equipment, to pay the sum and the installments thereof unpaid under a certain promissory note which is of record in this case; and that such maritime lien is validly against said vessel and her engines, tackle, apparel, furniture and equipment superior in rank to all maritime or other liens of every name and nature against said vessel and her said engines, tackle, apparel, furniture and equipment, excepting only the maritime liens herein foreclosed of the above-mentioned John Kadlec and each and all of the other libelant and intervening libelants in this case; and that as to said maritime lien of said intervening libelants Putnam and Overman against said vessel, her engines, tackle, apparel, furniture and equipment, they are entitled to have such vessel, her engines, tackle, apparel, furniture and equipment condemned and sold and the proceeds of her sale applied to pay the amount of such claim and

claims of said intervening libelants Putnam and Overman under and by virtue of [482] said promissory note and preferred ship mortgage, subject, however, to prior full and complete payment of the claims in the amounts herein found due of the libelant and said intervening libelants and said Kadlec, and provided that if, after the payment of such claims and the taxable costs of such libelant and intervening libelants and said Kadlec in full, there are any remaining proceeds of sale, then the remainder of any proceeds of such sale of said vessel, her engines, tackle, apparel, furniture and equipment, shall be applied next to the payment of the claims and costs herein awarded in favor of said intervening libelants Putnam and Overman.

It is further so found, concluded and decided that for any unpaid sum in this decision found due and owing to said Kadlec and such libelant and other intervening libelants, and also to said intervening libelants Putnam and Overman, or any of them, after applying such sale proceeds to payment of such claims in accordance with the order of their superiority in rank as heretofore announced in this decision, then any deficiency so remaining unpaid shall be paid by said respondent Robert J. Tobin to such of said claimants as [483] so remain unpaid.

Is there any issue tendered in this case not decided by the Court's orally announced decision?

Mr. Carey: Yes.

Mr. Crutcher: Yes, Your Honor. There is a counter-claim asserted as a so-called third affirma-

tive defense of wrongful attachment of the vessel.

The Court: The Court finds, concludes and decides that there was no wrongful attachment of the vessel by the libelant or any one of the intervening libelants; that the right of action of such libelant and intervening libelants had already arisen and the right to sue had already arisen at least three days before the libels of such libelant and intervening libelants were filed. [484]

And now your question, Mr. Carey.

Mr. Carey: Your Honor overlooked a very important matter.

The Court: I am very anxious not to end this hearing without disposing of everything.

Mr. Carey: The matter of allowing attorney's fees for the foreclosure of the preferred ship mortgage.

The Court: Does any one else think of any other issue overlooked?

Mr. Collins: I might suggest that the findings should probably deny our claim of \$100.00 loss of use per day since the seizure.

The Court: The Court believes that that should be done, and the Court finds, concludes and decides that the claim of the respondent Tobin in the nature of demurrage or detention of the vessel to the extent of \$100.00 a day——

Mr. Collins: That was the claim. Of course, I am not agreeing to it. I am just suggesting it. In keeping with Your Honor's theory, it should be put in, I think.

The Court: (Continued) ——is not valid and

should not be allowed, and that said respondent Tobin take nothing by his affirmative defenses and [485] counterclaims asserted by him in this action.

The Court further finds, concludes and decides that the sum of \$ (Later set at \$2500.00) is a reasonable sum to be allowed to Mr. Stephen V. Carey as proctor for said Fred I. Putnam and James A. Overman, the mortgagees and additional intervening libelants in this action for his services in connection with the foreclosure of said mortgage.

Will you, Mr. Carey, advise the Court for the Court's convenience at this time what did you ascertain to be the final amount by the computations you have made up to this time due to your clients under that note and mortgage?

Mr. Carey: Well, I haven't made the computation, Your Honor.

The Court: Do you know what it is approximately?

Mr. Carey: Just a moment, Your Honor.

(Mr. Carey confers with Messrs. Putnam and Overman.)

Mr. Carey: The face of the note is \$30,000.00, and there is approximately \$750.00 interest accumulated.

The Court: And there has been nothing paid on principal? [486]

Mr. Carey: No.

The Court: Have counsel talked together and given each other the benefit of their suggestions about what would be a reasonable sum for attorney's fees in this case?

Mr. Carey: No. I haven't discussed it with anybody.

Mr. Crutcher: I would suggest that that could be appropriately done between now and the time we appear for the signing.

Mr. Carey: We agreed to leave it with Your Honor, and I am perfectly willing to leave it there. If counsel wants to make some suggestions, I have no objection to the making of suggestions, but I am not going to bargain with the opposition.

The Court: The only way I would welcome suggestions from one would be to have suggestions from both sides.

Mr. Carey: Well, I have no objections to the making of suggestions.

(At this time discussion was had relative to the legal services performed by Mr. Carey on behalf of the intervening libelants Putnam and Overman.) [487]

Mr. Carey: My own judgment is that \$2500.00 would be a proper fee for such services.

The Court: Any objection to that?

Mr. Crutcher: I think that is just about right.

The Court: That is what I think.

The reporter in the notes already made by the Court where the place is left blank as to the amount of the attorney's fee will fill in there the sum of \$2500.00.

Now, were there any other issues which counsel for libelant and intervening libelants wish to mention as not having been disposed of by the Court's orally announced decision up to this time?

Mr. Crutcher: One matter, may it please the Court, is evidence in the case which tends to show that as to each of the six crew member libelants, except Kadlec to whom it does not apply and Peecher,—there is evidence of earnings——

The Court: The Court, of course, requires that credit be given on these claims adjudged due and owing for the amounts already received on account of their lay fishing contract by the libelant and intervening libelants,—— [488]

Mr. Crutcher: I assumed Your Honor did, but——

The Court: (Continued) ——and the correct amounts of the lien claims are to be finally determined by ascertaining the remainder after such deduction or credit.

Mr. Crutcher: I have those figures in our brief.

The Court: Well, I wish you to have them put in the proposed findings of fact, conclusions of law and judgment and decree, which are to be proposed in this case.

Is there any other detail not covered?

Now, if that is all, I wish to indulge your time just for a moment to state one or more reasons why the Court has adjudged valid and superior in rank these fishermen's claims as maritime claims against the vessel, etc.

It is true that in a case of a labor contract where the issues between the lay fishermen on the one hand and the ship on which they were employed and the owner of that ship on the other hand, on this question of whether or not the share of the

prospective catch not yet realized the fishermen have a maritime lien for damages for [489] unpaid wages or have a seamen's work contract maritime lien of that kind, it seems to the Court from the best I can learn from the briefs and also from the Court's own search that there is not a Ninth Circuit or Supreme Court case already decided absolutely in point.

I feel certain, however, that the right of fishermen seamen for unpaid expected work liens against their fishing vessel under an express work contract is no less than that against another vessel not a party to the labor contract for a maritime tort lien such as that involved in the Carbone case reported in 209 F. 2d 178, and the conclusion that there is a valid maritime lien for such unpaid expected work of the rank attributed to it in this Court's decision now made in this case is one which comes a fortiori from the Carbone case approval of a maritime tort lien claim against a stranger vessel respecting in part the same kind of a claim as that involved in this case, namely, a claim for the present value of each share of the fishermen seamen in the prospective season's fish catch.

The circumstance in the Carbone case that only five days prospective catch may have been [490] involved is no different in principle than if a five months prospective catch or the whole 1954 tuna season's catch had been involved.

However, Judge John Parker's dissent in the Fourth Circuit case of *Old Point Fish Co. vs. Hay-*

wood, 109 F. 2d 703, is a strong supporting pillar which cannot properly be overlooked when considering what the opinion of the Ninth Circuit Court of Appeals is or may be on this question, although the majority ruling in the Haywood case is against this Court's decision.

The Ninth Circuit Court of Appeals has said in the Carbone maritime tort lien case that there is a lien for that kind of an interest which is here involved, and this Court cannot believe that the Ninth Circuit Court of Appeals will refuse to apply the rule announced in the Carbone case to the facts and cause of action in the case at bar involving breach of seamen's work contracts for lay shares of the prospective 1954 tuna fishing season's catch of the vessel which is held by this Court to be subject to a maritime lien for the cause of action stated.

When will counsel wish to present findings of fact, conclusions of law, judgment and decree [491] in this matter?

The vessel is still in the Marshal's custody as I understand it and I imagine is accumulating day to day costs.

Mr. Crutcher: We would like to be in a position to present that some time late this week, Your Honor, if we can, possibly Thursday.

(Discussion was had relative to the setting of a date for the entering of findings of fact, conclusions of law, judgment and decree.)

Mr. Crutcher: Would this be agreeable to Your Honor, if our findings and conclusions and proposed form of decree are prepared and served by

Monday and lodged with the Court on Monday, might we have the matter noted for Wednesday, the 28th of October?

The Court: I prefer it on the 28th. Any objection?

Mr. Collins: No objection.

Mr. Wells: I will respectfully say that I will be involved in a mal-practice action in Superior Court on the 26th. However, long before the matter has come into Court I will have looked at the findings prepared and will authorize Mr. Crutcher to speak for me. [492]

The Court: Is that agreeable?

Mr. Crutcher: Quite agreeable.

The Court: I wish to invite all counsel to be present if that is possible and I assure you that your presence will be helpful to the Court, but if any one of counsel on the side of the fishermen presents approved forms of the papers to be entered by the Court and is then authorized to speak for all, the Court will not feel that it is out of order for you to be absent. I take it from the fact that Mr. Crutcher has borne the laboring oar more or less that he will try to be here.

Mr. Crutcher: I will, Your Honor.

The Court: Then on the other side, I hope that both counsel can be present. Do you anticipate any conflicting appointments on that day?

Mr. Collins: I do not, Your Honor.

Mr. Carey: I don't.

The Court: It is then set for ten o'clock in the

forenoon on October 28th. Until then, those connected with this case are excused.

I ask you to provide for condemnation and sale of the vessel and the paying out of the proceeds on those libels and intervening libels to [493] lien claimants in harmony with the foregoing, that is, I wish the provisions as to validity and rank of liens and as to condemnation and sale of the vessel and distribution of proceeds of sale upon the libel of the intervening libelants Putnam and Overman to be repeated to the same effect as stated in respect to the fishermen libelant and intervening libelants.

Mr. Carey: Very well, Your Honor.

(At 2:40 p.m., Monday, October 18, 1954, trial proceedings concluded.) [494]

[Endorsed]: Filed December 21, 1954.

[Endorsed]: No. 14645. United States Court of Appeals for the Ninth Circuit. Fred I. Putnam and James A. Overman, Appellants, vs. Harry C. Lower, John Kadlec, George S. Herning, Edgar L. Peecher, William E. Barquist and Norman L. Bunker, Appellees. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed: February 7, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

[Endorsed]: No. 14645. United States Court of Appeals for the Ninth Circuit. Fred I. Putnam and James A. Overman, Appellant, vs. Harry C. Lower, et al., Appellee. Supplemental Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed: April 12, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14645

FRED I. PUTNAM and JAMES A. OVERMAN,
Appellants,

vs.

HARRY C. LOWER, et al., Appellees.

The Oil Screw SILVER SPRAY, etc., et al.,
Respondents.

STIPULATION ON EVIDENCE, ISSUES AND
PLEADINGS ON APPEAL

It Is Stipulated between the undersigned proctors
for the respective parties to this appeal as follows:

* * * * *

4. That the proof of mitigation of damages by

the respective libelant crew members sustains the finding of fact thereon, being Finding XXII, and that the testimony pertaining thereto is not relevant to the appeal.

* * * * *

Dated this 4th day of February, 1955.

PEYSER, CARTANO, BOTZER &
CHAPMAN,

/s/ By VERNON H. BOTZER,
Proctors for Appellants

* * * * *

[Endorsed]: Filed Feb. 7, 1955. Paul P. O'Brien,
Clerk.

